152 US 133

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 203.

GEORGE W. LAWTON AND FRANK C. MULLIN, PLAINTIFFS IN ERROR,

vs.

WILLIAM N. STEELE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 29, 1890.

(14,184.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 22, 1893.

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1 STATE OF NEW YORK, }
Jefferson County Clerk's Office. }

I, O. D. Greene, clerk of the county of Jefferson and of all the courts of record in and for the said county and of the supreme court in and for the fourth judicial department in the county aforesaid, the same being a court of record, do hereby certify and return that the following are true and correct copies of the record, remittitur of court of appeals, judgment-roll, opinions of the court, writ of error and allowance thereof, citation and proof of service thereof, and of all the records and proceedings in the action of George W. Lawton and Frank C. Mullin against William N. Steele on file in said clerk's office, and that I have compared the
2 same with the originals thereof on file as aforesaid, and that the same are true and correct transcripts of said originals and of the whole thereof.

Seal Jefferson County, N. Y.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said county and court, at Watertown, this 30th day of August, 1890.

O. D. GREENE, *Clerk.*
By GEO. H. WALKER, *Dep. Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable justices of the supreme court of the State of New York, in the fourth judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you or some of you the final decree or judgment of said court, to be enforced in the suit between George W. Lawton and Frank C. Mullin, plaintiffs, and William N. Steele, defendant, wherein the said George W. Lawton and Frank C. Mullin drew in question the validity of certain statutes of and authority exercised under a State on the ground that the same was repugnant to the Constitution of the United States and the said decision was in favor of their validity, and wherein the said George W. Lawton and Frank C. Mullin claimed a right, title, privilege, and immunity under the Constitution of the United States and the said decision was against the right, title, privilege, and immunity so claimed by said plaintiffs, and wherein the said George W. Lawton and Frank C. Mullin, plaintiffs as aforesaid, set up, claimed, and contended that certain statutes of the State of New York, being chapter 591, Laws of 1880 of said State, entitled "An act for the appointment of game and fish protectors," and chapter 317, Laws of 1883 of
4 said State, entitled "An act to amend chapter 591, Laws of 1880, entitled 'An act for the appointment of game and fish

protectors,'" and chapter 141, Laws of 1886 of said State, entitled "An act to prevent taking fish from the waters of Lake Ontario, adjacent to the shore of Jefferson county, by other means than angling," and certain authority exercised by the defendant under and in pursuance of the aforesaid statutes were violative of and repugnant to the provisions of the Constitution of the United States and particularly to the provisions of article fifth of the amendments and section one, article fourteenth, of the amendments to said Constitution and the decision was that said several statutes were not violative of and repugnant to the foregoing provisions of the Constitution of the United States and was in favor of the validity of said statutes and of the authority exercised by defendant under and in pursuance of said statutes, a manifest error hath happened, to the great damage of the said George W. Lawton and Frank C. Mullin, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the second Mon-
5 day of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of June,
[L. S.] in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York, in the Second Circuit.

E. C. EMERSON,
Attorney for Plaintiffs in Error, Watertown, N. Y.

6 The within is a copy of a writ of error granted in within-entitled action and filed in Jeff. Co. clerk's office this 14 day of June, 1890.

Yours, &c., E. C. EMERSON,
Att'y for Pl'ff in Error, 7 Amer. Arcade, Watertown, N. Y.

To Elon R. Brown, Esq., att'y for def't in error.

[Endorsed:] United States Supreme Court. Geo. W. Lawton *et al.*, pl'ffs in error, *vs.* W. N. Steele, def't in error. Writ of error. E. C. Emerson, attorney for pl'ffs in error, Watertown, N. Y. Allowed. Wm. C. Ruger, chief judge court of appeals of New York.

7 UNITED STATES OF AMERICA, *ss:*

To William N. Steele, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the Capitol, in the city of Washington, on the second Monday in October, 1890, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York in and for the county of Jefferson, wherein George W. Lawton and Frank C. Mullin are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. C. Ruger, chief judge of the court of appeals of New York, this 4th day of June, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Allowed.

WM. C. RUGER,
Chief Judge Court of Appeals, State of New York.

8 Due and personal service upon me of a copy of within citation at the city of Watertown, Jefferson county, N. Y., is admitted this 18 day of June, 1890.

ELON R. BROWN,
Att'y for Defendant in Error, Watertown, N. Y.

STATE OF NEW YORK, *ss:*

9 Court of Appeals.

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 25th day of February, in the year of our Lord one thousand eight hundred and ninety, before the judges of said court.

Witness the Hon. Willian C. Ruger, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur, February 26, 1890.

10 GEORGE W. LAWTON & Another, Appellants,
vs.
WILLIAM N. STEELE, Respondent.

Be it remembered that on the 13th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, George W. Lawton & another, the appellants in this action, came here into the court of appeals, by E. C. Emerson, Esq., their attorney, and filed in the said court a notice of appeal and return thereto from an order of the general term of the supreme court of the State of New York, and William N. Steele, the respondent in said action, afterwards appeared in said court of appeals, by Elon R. Brown, Esq.,
11 his attorney, which said notice of appeal and the return thereto filed as aforesaid are hereto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. E. C. Emerson, of counsel for appellants, and Mr. Elon R. Brown, of counsel for respondent, and after due deliberation had thereon, did order and adjudge that the order of the general term of the supreme court appealed from to this court be, and the same hereby is, affirmed and judgment absolute ordered for the defendant on the stipulation with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed, &c., &c., as aforesaid.

12 And hereupon as well as the notice of appeal and return thereto as aforesaid as the judgment of the court of appeals aforesaid by them given in the premises and by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Feb'y* 26, 1890.

13 I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court
[L. S.] of appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS, *Clerk.*

STATE OF NEW YORK:

In Court of Appeals.

At a court of appeals for the State of New York, held at the capitol, in the city of Albany, on the second day of June, A. D. 1890.

Present: Hon. William C. Ruger, chief judge, presiding.

GEORGE W. LAWTON & ANO., Appellants,
vs.
WILLIAM N. STEELE, Respondent.

14 A motion having heretofore been made to amend the remittitur heretofore issued in the above-entitled action and due deliberation having thereupon been had—

Ordered that the said motion be, and the same hereby is, granted and the said remittitur hereby amended so as to read as follows, viz:

"Whereupon the said court of appeals, having heard said appeal argued by Mr. E. C. Emerson, of counsel for the appellants, and Mr. Elon R. Brown, of counsel for the respondent, and the said appellants having drawn in question the validity of chapter 141, Laws of the State of New York for the year 1886, and also section 2 of

chapter 591, Laws of the State of New York for the year 1880,
15 as amended by chapter 317 of the Laws of the State of New York for the year 1883, and also the authority exercised by the defendant under the same, on the ground that said statutes and authority were repugnant to the provisions of the Constitution of the United States, and after due deliberation thereon, the said court of appeals having passed upon the validity of the aforesaid statutes and authority, did order and adjudge that the same were valid and were not repugnant to the provisions of the said Constitution of the United States in so far as the provisions of said statutes relate to the questions involved in this appeal and the facts in this case, and did order and adjudge that the order of the general term of the supreme court be, and the same hereby is, affirmed
16 and judgment absolute ordered for the defendant on the stipulation with costs."

A copy.
[L. S.] GORHAM PARKS, *Clerk.*

STATE OF NEW YORK:

In Court of Appeals.

At a court of appeals for the State of New York held at the capitol, in the city of Albany, on the twenty-first day of March, A. D. 1890.

Present: Hon. William C. Ruger, chief judge, presiding.

GEORGE W. LAWTON & ANO., Appellants,
vs.
WILLIAM N. STEELE, Respondent.

17 A motion for a re-argument of the above cause having been heretofore made upon the part of the plaintiffs herein, and papers having been duly submitted thereon and due deliberation thereupon had—

Ordered that said motion be, and the same hereby is, denied with costs.

A copy.
[L. S.] W. H. SHANKLAND, *Dep. Clk.*

18 STATE OF NEW YORK, } ss.:
Jefferson County Clerk's Office, }

I, O. D. Greene, clerk of the county of Jefferson and of all the courts of record in and for said county, do hereby certify that I have compared the annexed copies of notices of appeal, judgment-roll, order for judgment, case and exceptions, decision, and order of reversal of general term, judgment of reversal and order permitting appeal to the court of appeals, with the originals thereof on file in this office, and that the same are true and correct transcripts therefrom and of the whole of said originals.

Witness my hand and seal of office this 18th day of June, 1889.
[L. S.] O. D. GREENE, *Clerk.*

Supreme Court.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by EDWARD MULLIN, His Guardian *ad Litem*,
vs.
WILLIAM N. STEELE.

Take notice that the plaintiffs above named, and each of them, hereby appeal to the court of appeals from the order made by the general term of the supreme court in and for the fourth judicial department, and entered in the clerk's office of Jefferson county on the 3rd day of April, 1889, reversing the judgment entered in this action in said clerk's office on the 25th day of May, 1888, in favor of plaintiffs and against defendant for $216 damages and $166.09 costs and granting a new trial in this action, and this appeal is from the whole and every part of the said order of reversal, and the said plaintiffs above named and each of them do hereby stipulate and assent that if the said order reversing said judgment and granting a new trial be affirmed upon said appeal, judgment absolute shall be rendered against them, said appellants.

Yours, &c., E. C. EMERSON,
Att'y for App'ts, 7 American Arcade, Watertown, N. Y.

To Elon R. Brown, Esq., def't's att'y.

Filed May 11, 1889.

O. D. GREENE,
Clerk Jeff. Co.

19 STATE OF NEW YORK, } ss:
County of Jefferson, }

Supreme Court.

I, O. D. Greene, clerk of the supreme court in and for said county, do hereby certify that I have compared the following copies of notice of appeal, judgment-roll and case and exceptions with the originals on file in this office, and that the same are correct copies thereof and of the whole of said originals.

Witness my hand and seal of office, this — day of Au-
[L. S.] gust, 1888.

O. D. GREENE, *Clerk.*

Supreme Court.

GEORGE W. LAWTON and Another
vs.
WILLIAM N. STEELE.

Take notice, that the defendant hereby appeals to the general term of this court from the order denying the motion to set aside the verdict herein and sustaining the same, and from the judgment against the defendant for $382.09 entered May 25th, 1888, in Jeff. Co. clerk's office.

Yours, &c., DORWIN & BROWN,
Def'ts Att'ys.

To E. C. Emer[illegible] O. D. Greene, clerk.

20 Supreme Court, County of Jefferson.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by EDWARD MULLIN, His Guardian *ad Litem*,
vs.
WILLIAM N. STEELE, EDWARD L. SARGENT, and RICHARD U. SHERMAN.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Jefferson.

Dated the 28th day of July, 1887.

E. C. EMERSON,
Plaintiffs' Attorney.

Office, 7 Amer. Arcade; P. O. address, Watertown, Jeff. Co., N. Y.

Supreme Court, Jefferson County.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by EDWARD MULLIN, His Guardian *ad Litem*,
vs.
WILLIAM N. STEELE, EDWARD L. SARGENT, and RICHARD U. SHERMAN.
Complaint.

I.

The plaintiffs complain of the defendants and allege the following facts for cause of action: The plaintiffs reside in the town
21 of Brownville, Jefferson county, N. Y., and the plaintiff, Frank C. Mullin, is an infant of the age of twenty years.

Prior to the commencement of this action and on the 28th day of July, 1887, upon the application of said Frank C. Mullin, an order was duly made by Hon. P. C. Williams, justice of the supreme court, appointing Edward Mullin guardian *ad litem* of said Frank C. Mullin, for the purpose of prosecuting this action, and the said Edward Mullin is now the duly appointed and acting guardian *ad litem* of said Frank C. Mullin for the purposes aforesaid.

The plaintiffs further allege that at the time hereafter mentioned, they were the lawful owners of and in possession of fifteen hoop or fyke nets of the value of $525 at the town of Brownville aforesaid.

That at said town of Brownville, in the county of Jefferson, on the 5th day of May, 1887, the said defendants wrongfully and unlawfully took, converted and disposed of the said hoop or fyke nets aforesaid to their own use to the plaintiffs' damage in the sum of five hundred and twenty-five dollars.

II.

For a second and further cause of action, the plaintiffs repeat the allegations contained in the first cause of action above set forth, as to the infancy and age of the plaintiff Frank C. Mullin, and as to the appointment of Edward Mullin as his guardian *ad litem* for the purpose of prosecuting this action, and said allegations are hereby referred to and made a part of this cause of action.

The plaintiffs further allege that at the time hereafter mentioned, they were the lawful owners of and in possession of one hoop or fyke net at the town of Brownville, Jefferson county, N. Y., of the value of thirty-five dollars.

That at said town of Brownville, on the 7th day of May, 1887, the said defendants wrongfully and unlawfully took, converted and disposed of the said hoop or fyke net aforesaid to their own use to the plaintiffs' damage in the sum of thirty-five dollars.

Wherefore, the plaintiffs demand judgment against the de-
22 fendants for the sum of five hundred and sixty dollars besides the costs of this action.

E. C. EMERSON,
Plaintiffs' Att'y, 7 Amer. Arcade, Watertown, N. Y.

In Supreme Court.

GEORGE W. LAWTON and Ano. }
vs. } Answer.
WILLIAM N. STEELE and Others. }

The defendants William N. Steele and Edward L. Sargent for answer to the complaint herein; deny any knowledge or information sufficient to form a belief as to the allegations in said complaint relating to the age of the plaintiff Mullin, the appointment of a guardian *ad litem* and the ownership of nets, and deny each and every other allegation in said complaint contained.

DORWIN & BROWN,
Defendants' Attorneys.

JEFFERSON COUNTY, *ss.:*

Edward L. Sargent, being duly sworn, says he is one of the defendants answering above, and that the foregoing answer is true to his own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

E. L. SARGENT.

Subscribed and sworn before me Sept. 27, 1887.

JAMES DOLAN,
Notary Public.

23 Supreme Court, Oneida County.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by EDWARD MULLIN, His Guardian *ad Litem*,

vs.

WILLIAM N. STEELE, EDWARD L. SARGENT, and RICHARD U. SHERMAN.

First. The above-named defendant, Richard U. Sherman, for answer to the complaint of the plaintiffs herein, denies each and every allegation therein contained except as to the appointment of said Edward Mullin guardian *ad litem* of Frank C. Mullin, and as to that allegation said defendant denies that he has sufficient knowledge or information to form a belief concerning the same, and therefore denies such allegation.

Second. The said defendant for further answer to said complaint alleges, that during the three years immediately prior to the 15th day of July, 1887, said defendant Sherman, together with Robert B. Roosevelt, William H. Bowman and Eugene G. Blackford constituted the "commissioners of fisheries" of the State of New York.

That they were all duly appointed in accordance with the statutes in such case made and provided.

That each of said persons duly qualified as a member of the "commissioners of fisheries" aforesaid, and is now and has been for more than three years last past, acting in that capacity.

That as such commissioners they had power to give direction to game and fish protectors concerning the enforcing of the game law.

Defendant further alleges on information and belief, that no direction of any kind was ever given by said commissioners nor any member of the "commissioners of fisheries" of the State of New York concerning the nets or fykes mentioned in said complaint nor concerning transaction set forth in said complaint.

24 Defendant further alleges that said defendant is now and has been for more than a year last past a game and fish protector duly appointed by the governor of the State of New York under and by virtue of chapter 591 of the Laws of 1880, entitled, "An act for the appointment of game and fish protectors," and the amendments thereof, and that said Steele duly qualified as such officer and is now acting in that capacity.

Defendant further alleges that he has converted no nets or fykes to his own use, and that he has no knowledge of any nets or fykes being converted to the use of either of the other defendants.

Defendant further alleges that he is informed and believes the nets or fykes referred to in the complaint herein, were at the time they were taken possession of by said Steele, as such game and fish protector, if they were taken possession of at all by him, being used by plaintiffs or with their consent in an unlawful manner. That they were found or maintained in or upon the waters of this State or upon the shores thereof in violation of existing statutes for the protection of fish and game, and thereby became a public nuisance. That whatever said Steele did in the premises, he did as a game and fish protector.

That defendant is informed and believes as such he had the right to take possession of said nets or fykes in accordance with section 2 of chapter 591 of the Laws of 1880, entitled, "An act for the appointment of game and fish protectors," and the amendments and additions thereto.

Wherefore, defendant demands judgment for the dismissal of said complaint and for the costs of this action.

COOKINGHAM & SHERMAN,
Att'ys for Def't Sherman, 20 Mann Building, Utica, N. Y.

ONEIDA COUNTY, *ss:*

Richard U. Sherman, being duly sworn, says he is one of the defendants in the above entitled action: that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to those matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

R. U. SHERMAN.

Sworn to before me this 14th day of Sept., 1887.
JAMES P. REILLY,
Notary Public, Oneida Co., N. Y.

Supreme Court, State of New York.

At a circuit court and special term of the supreme court held at the court-house in the city of Watertown, Jefferson county, in and for the fifth judicial district of the State of New York, on the 26th day of March, 1888.

Present: Hon. P. C. Williams, justice presiding.

GEORGE W. LAWTON *et al.*
vs.
WILLIAM N. STEELE *et al.*

E. C. Emerson and W. F. Porter.
April 16, 1888.
Dorwin & Brown and Cookingham & Sherman.

Jurors.

Henry Brimmer,	L. F. Brown,
Nelson Hosmer,	G. D. Ormiston,
John Main,	Herbert Loveland,
Benjamin B. Woodruff,	H. M. Patterson,
Jerome Martin,	Sylvester Snell,
Moses Petrie,	Roswell Hildreth.

Witnesses sworn.

For plaintiff:	For defendant:
George W. Lawton,	E. L. Sargent.
Byron Ackerman,	
John C. Barber,	
Edward Mullin,	
Morgan Williams,	
George M. Reed,	
William N. Steele,	
James Curran,	
John Muir.	

26 By direction of the court the jury render a verdict subject to the opinion of the court, against the defendant Steele and in favor of the plaintiff for $216 and in favor of defendants Sargent and Sherman against plaintiff.

Enter. WILLIAMS, *J.*

A copy.

O. D. GREENE, *Clerk.*

At a circuit court and special term of the supreme court held at the court-house in the city of Watertown, county of Jefferson, on the 26th day of March, 1888.

Present: Hon. P. C. Williams, justice supreme court.

Supreme Court.

GEORGE W. LAWTON *et al.*
vs.
WILLIAM N. STEELE *et al.*

This cause having been brought to trial at this term of the court, held by Hon. P. C. Williams, justice supreme court, and the same having been tried by a jury, and the case presenting only questions of law, and the jury by direction of the court having found a verdict in favor of the plaintiffs and against defendant William N. Steele, for the sum of $216 subject to the opinion of the court, and the said defendant Steele having at the same term of court made a motion before the judge holding said trial term as aforesaid, to set aside said verdict and for judgment in his favor against plaintiffs, and the plaintiffs having at the same time and place and before the same judge made a motion for judgment on said verdict, and after hearing E. C. Emerson, plaintiffs' attorney, in behalf of said plaintiffs, and Elon R. Brown, of counsel for defendant Steele, opposed,

It is ordered, that the said motion made by defendant Steele, to set aside said verdict and for judgment in his favor against
27 plaintiffs, be and the same is hereby denied, with $10 costs to plaintiff against said defendant Steele.

It is further ordered, that the motion so made by plaintiffs for judgment on said verdict be and the same is hereby granted, and

that plaintiffs have judgment against defendant Steele upon said verdict for $216 damages, besides the costs of this action.

And it further appearing, that this is a difficult and extraordinary case in which a defense has been interposed, it is further ordered, that the plaintiffs have an extra allowance of costs of 5 per cent. upon said recovery against defendant Steele.

Enter. WILLIAMS, *J.*

A copy.

GEO. H. WALKER, *Dep. Clerk.*

In Supreme Court.

GEORGE W. LAWTON *et al.*
vs.
WILLIAM N. STEELE *et al.* } Case and Exceptions.

This cause being at issue was brought on for trial at the Jefferson circuit April 16, 1888, before Mr. Justice Williams and a jury.

The plaintiff proved the age and appointment of a guardian *ad litem* of Frank C. Mullin, and the consent of the guardian, and the order made by the court appointing him, as alleged in the complaint.

The plaintiff also gave in evidence a map of Black River bay and adjacent territory, which is hereto attached, and same may be produced on argument of any appeal in supreme court or court of appeals.

GEORGE W. LAWTON, plaintiff, sworn in his own behalf:

I am one of the plaintiffs in this action; reside on Pillar point; know the plaintiff Frank C. Mullin; we were the owners of a quantity of nets on May 5, 1887—sixteen; they were hoop nets or fyke nets; they were taken May 5th.

28 (It was here conceded that they were in Black River bay; all except 4 that were on Perch River bridge; these four were not in the water; all the rest were set in Black River bay. It was agreed between counsel that the four on shore were worth $36. There were twelve seized in the water; they were set at the point so marked on the map.)

Witness continues: They were set a half or three-quarters of a mile out in Black River bay from the Perch River bridge; those that were in the water were in there for fishing purposes to catch fish; set for fish; no other nets were set in that locality.

Cross-examination:

I and my partner set them there; we got bullheads, eels, sunfish and rock bass and some pickerel, no black bass; never saw a black bass in a net there that last spring; no muscalounge; the meshes in these nets were an inch and an inch and a half; we had none smaller than that, but the meshes shrank from the time they were built;

Black River bay lets in from Lake Ontario and it is an inlet that lies between the most westerly point of Pillar point and Ellisburg, the line between Jefferson and Oswego counties; the nets that were on shore had been removed from the water for the purpose of putting them away; I don't know how many times they hauled them; I hauled them once; I don't know how many times they were hauled after that; some of them were set all winter; some 12 or 13; I took the haul in the spring after the ice went out; we hauled two or three times during the winter.

EDWARD MULLIN, sworn for plaintiff:

I reside on Pillar point; am the father of the plaintiff Frank C. Mullin; am guardian for Frank C. Mullin for the purposes of this action; the place where these nets were set is called Black River bay; I have lived on Pillar point 20 years; before that I lived two miles above Dexter in the town of Brownville; have known these waters 43 years; Black River bay commences at the mouth of the river; across here to Muscalounge bay; the head of the bay runs from the mouth of Black river across to the mouth of Muscalounge creek, and the waters are called Black River bay out
29 towards the lake as far as the light-house on the south and to the end of Pillar point on the north or west; waters are called Black River bay from Reed's point on the north to the light-house on the south; I understand it is called Henderson bay from the light-house over to Six Town point; at the time these nets were taken they were westward from the mouth of Black river three-fourths of a mile; none of them over half a mile from shore; the bay at that point is about a mile across; the distance from the place where the nets were set to the end of Pillar point I should say was eight miles; six to Reed's point, and 5½ to six miles to Bull rock; the distance from Pillar point to Sacket's Harbor is 14 miles; across the bay opposite Catfish point is called a mile and a half.

Cross-examination:

I should say there was no point in Black River bay where the bay is less than a mile wide; I should say it was just about a mile from my place across; that is about the shortest distance of any.

MORGAN WILLIAMS, sworn for plaintiff:

I reside on Pillar point; am 70 years of age; have resided there for 57 years at what is called Sherwin's bay south of Reed's point.

Q. You may state what waters are called Black River bay and have been ever since you have been familiar with them.

A. We called Black River bay from the end of Bull Rock point to the head of Horse island.

Q. All the waters lying in above that you call it Black River bay?

A. Yes, sir; that has been called Black River bay ever since the country was settled as I understand it; the waters that lay in south of Horse island and out in Campbell's bay and around Six Town

point are called Henderson bay; between Six Town point and Horse island, and has been ever since the country was settled; the waters outside those points are called Lake Ontario; the waters outside of Pillar point and Six Town point are called Lake Ontario, the foot of Lake Ontario.

30 Cross-examination:

Sacket's Harbor is on Black River bay; up the bay about a mile from Horse island; Black River bay is an inlet or bay of Lake Ontario; Perch river, Muscalounge creek and Black river all flow into Black River bay. There's a current in Black River bay between Bull rock and Horse island when there is no wind, but it cannot be perceived when the wind blows in the bay; Black river at Brownville is about 15 rods wide; this is four miles above Dexter; the most of the way it is quite a rapid river; below Brownville and above Dexter it widens into a pond of slack water about 100 rods wide; the river again narrows down at Dexter; about three-quarters of a mile below Dexter the river opens into the bay; the river at its mouth is about 75 or 80 rods wide. Black River bay at its head is quite wide, about two miles, I should think; Black river is navigable for lake vessels up as far as Dexter.

GEORGE M. REED, sworn for plaintiff:

I live at Sacket's Harbor; I am a lake captain; have been engaged in it all my life; live at Sacket's Harbor all my life; I have been acquainted with Black River bay and Henderson bay and Lake Ontario about 30 years; I generally considered Black River bay went out from Horse island across to Bull rock; all in east of that, Black River bay; there is a difference of opinion about that; up to the mouth of Black river and has been called so as long as I have known; it is called Henderson's bay directly across from Horse island to Six Town point, and that has been so called ever since I have known; I call it Lake Ontario clear in as far as you can go, clear in to the mouth of Black river; the local name has been Black River bay.

Cross-examination:

A bay is a branch of the water between two head-lands, an arm of the sea between two head-lands, and Black River bay is one of the bays of Lake Ontario and Henderson bay is another.

(Defendants' counsel admit that the waters in question are called Black River bay, and that it is an arm of Lake Ontario.)

31 Plaintiff then read in evidence the examination before trial of defendant, WILLIAM N. STEELE, which was as follows:

"I am one of the defendants in this action; reside at Clayton; I am one of the State game and fish protectors; I was in Dexter I think on the 5th of May, 1887; went there on Thursday; I commenced taking up nets about two o'clock on the 5th and worked at it until 3 o'clock the next morning; I took nets out of the water

that afternoon and evening; I took that night all nets out of the water of Black River bay about one-half a mile or three-fourths of a mile from Perch River bridge; there were some nets on shore that were taken away in a wagon with the rest; these nets were near the west end of the bridge, Perch River bridge; we drew these nets off and they have all been destroyed; the defendant Sherman, the fish commissioner, instructed me to go and take nets where I could find them where it was unlawful to have them; I returned Saturday, and Saturday night I took another net from near where the first 11 were taken, and I destroyed that. The fish commissioners are over us; Mr. Sherman gave me no instructions as to nets in Black River bay; he never gave me any instructions as to nets in Black River bay; the general instructions he gave me was to take nets kept or set in violation of the law; he didn't tell me to take nets wherever I found them; he instructed me to obey the game law without telling me what those provisions were; he referred me to the game laws; I took those nets as a fish and game protector, believing them to be there in violation of the fish and game law; the only report I ever made about it was my regular monthly report to the fish commissioners required by law; those nets were all set for catching fish within one-fourth of a mile of shore; they all had fish in them except the four nets on shore."

The plaintiff then read in evidence certain sections of the history of Jefferson county by Franklin B. Hough, and first from page 15:

"Of our aboriginal names of places in our country but few are preserved. Mr. L. H. Morgan has given on a map, accompanying his work entitled, The League of the Iroquois, the following, as they are known in the Seneca dialect: Lake Ontario, Neahga, Tecarneodi."

32 Also from page 120:

"Champion was surveyed by Moses and Benjamin Wright in 1797, the former subdividing, and the latter surveying around it; the area, according to M. Wright, was 26,703 acres, and by B. Wright, 25,708 acres. It was subdivided into lots of 500 acres. This town was the first one in which actual settlements were begun in the county, unless, perhaps, Ellisburg, which was explored with a view of settlement about the same time. The following advertisement appeared in the Western Sentinel June 7, 1797:

"Lands for sale, lying on Black river, in the county of Herkimer, and State of New York."

I omit a paragraph.

"Also for sale, a township of land lying on Black river near Lake Ontario. These townships are all laid out in lots, and will be sold by large or small quantities, to suit purchasers, and the title indisputable. Also ten lots of land to be leased on first tract. Dated May 10, 1797. Signed Lemuel Storrs."

Page 121:

"Settlements were commenced in this town by Noadiah Hubbard in 1797, the details of which we give in the following letter, which

was written at our request and cannot fail of being read with interest."

Page 172, speaking of the town of Hounsfield:

"This town derives its name from Ezra Hounsfield, a native of Sheffield, England, who, about 1800, came to New York as agent for his brothers John and Bartholemew Hounsfield, manufacturers and merchants of Sheffield. He engaged in the hardware trade, and in company with Peter Kimball, purchased in common the south half of township No. 1, or the present town of Hounsfield."

Then skipping a little further down the same page:

"From an early period of the purchase, the waters of Black
33 River bay were regarded as an eligible place for a commercial point, and in a work published in Paris in 1801, the following description of it is given under the name of Niahoure: 'At the bottom of this gulf, Black river empties, forming a harbour sheltered from the wind and surges of the lake, which, during the prevalence of the southwest winds roll like those of the ocean. The land on the right or south of this bay is extremely fertile, and is a grove more fresh than can elsewhere be seen. That on the left, that is, the country that extends to the north of the bay of Niahoure as far as the St. Lawrence and east to the Oswegatchie, is not less fertile, and the colonists begin to vie in settling it.' This bay is elsewhere in the work described as comprising all the waters within Six Town point and Point Peninsula, which on ancient maps was named La Famine by the French, and Hungry bay by the English. On some maps this term is applied to what is now known as Henderson bay, and in others to Chaumont bay. The origin of the name is unknown, unless, perhaps, it may have been derived from the misfortunes of De la Barre in 1684.

"This town having been conveyed through Macomb and Constable to Harrison, Hoffman, Low and Henderson, as related in our history of the titles, fell to the share of Harrison and Hoffman in division, and the north part was conveyed June 13, 1797, for $58,333.33 to Champion and Storrs, amounting to 11,134½ with the town of Champion 25,708 acres. On the 14th of November, 1798, Champion and Storrs sold a portion of the above to Loomis and Tillinghas, receiving two notes of $6,000 each, which with a mortgage upon the premises not being paid, the tract was sold by a decree of chancery at the Tontine coffee-house, in New York June 20, 1801, and bid off by Augustus Sackett of that city, who received a conveyance from Champion and the assignees of Loomis and Tillinghast. While the sale was pending, Mr. Sackett having heard of the location and inclining to engage in its purchase, made a journey in 1801 to the place and was so struck with the great natural advantages for a port which the place presented, that he hastened back, and having secured the purchase, returned with a few men to commence improvements. In the second and third year, he erected an ample and convenient dwelling, and the little colony received the accession of mechanics and others. Other parts of the
34 town began to settle quite as early as the village, especially towards Brownsville, near which place Amasa Fox is said to

have made the first improvement in the town. In September, 1802, a traveler reported about thirty families living in township No. 1."

Plaintiff then gave in evidence record of conveyance of the town of Hounsfield from Josiah Ogden Hoffman to Peter Kemble and Ezra Hounsfield, dated March 10, 1801, and recorded in Jefferson county clerk's office, in Book C of Deeds, page 219, stating that the principal point for which he offered the same in evidence was the following clause, showing that the town is bounded westerly by Black River bay and Lake Ontario, to wit: "All that part of said township No. 1, bounded to the northward by the part of said town heretofore conveyed by the parties of the first part to Henry Champion and Lemuel Storrs, westerly by Black River bay and Lake Ontario, and southerly and easterly by the line of said township."

The plaintiff then gave in evidence Book I of Deeds, page 204, being the record of a conveyance made on the 5th day of October, 1816, between Thomas Ludlow Ogden, of the city of New York, and William H. Crawford, conveying the site known as Madison barracks, containing the following description:

"Beginning at the northwest corner of great lot No. 54, town of Hounsfield, being the southwest corner of piece of land lately owned by Samuel Love, said place of beginning being on the south shore of Black River bay; thence south 81 degrees, &c.; thence north to low-water mark on said bay; thence northeasterly along the shore of said bay to the place of beginning."

Plaintiff then gave in evidence Book G of Deeds, page 85, being record of a deed from Thomas Ludlow Ogden to Isaac Chauncey, captain in the U. S. Navy, being what is known as Ship-house point at Sacket's Harbor, containing the following description: "Situate, lying and being in the village of Sacket's Harbor, in the county of Jefferson, State of New York aforesaid; bounded by the waters of Sacket's Harbor and northwesterly and northeasterly by the
35 waters of said harbor and Black River bay; comprehending the tongue of land commonly called Navy point, and also the military establishment or works usually called Fort Tompkins."

Plaintiff also gave in evidence Book F of Deeds, page 293, record of a deed dated May 24, 1814, between Thomas Ludlow Ogden and Elisha Camp, containing the description: "Thence north 45 degrees west to low-water mark on the shore of Black River bay; thence along the same southwesterly," &c.

Plaintiff then gave in evidence Book S of Deeds, page 243, being the record of conveyance from Thomas L. Ogden and wife and Bartholemew Hounsfield, to William Murray, dated Nov. 18, 1822, which conveys with other lands, all those lands situate in the town of Brownville, lots 22, 23, 24, 25, 26, lying on the shores of Black River bay, containing altogether 379 acres of land.

EDWARD MULLIN recalled by plaintiff:

I know the land described in this deed and I own part of it myself; the land is located at this point here where it is marked with

my name on the map; that is where I reside; Catfish point is on opposite side of bay from me.

Dr. JOHN MUIR sworn for plaintiff.

I reside at Pierrepont manor, and have in my possession certain papers that belonged to the late William C. Pierrepont.

The witness then produced the letters patent issued to Alexander Macomb, which were read in evidence as follows:

"The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, Greeting:

Know you, that we have given, granted and confirmed and by these presents do give, grant and confirm unto Alexander Macomb, in consequence of a promise by him theretofore made from the commissioners of our land office, all that certain tract or parcel of land situated in the northern part of our said state, and comprehended within the following bounds viz: Beginning at the most westerly corner of the tract of land commonly called Totten and Crossfield's purchase, running thence along the same south 30 degrees east about 21 miles to the most westerly corner of township No. 5 of said purchase; thence westerly in a direct line to the northwest corner of a tract of 10,000 acres of land granted to Henry Cotheonix; thence with a direct line to the mouth of Salmon river where it empties into Lake Ontario to the northward of Oswego; thence northerly along the said lake and River St. Lawrence to a tract of land granted to Peter Penet; thence along the same south ten miles east ten miles north ten miles and west ten miles to the said River St. Lawrence; thence down along the said river to where a course south 61 east will strike the place of beginning; and thence south 61 degrees east about 14 miles to the said place of beginning; estimated to contain 120,000 acres, reserving out of the same 500 acres of land, as the same is located in surveyor-general's office, and with such bounds as shall be described in letters patent thereof hereafter to be granted. Together with all and singular the rights, hereditaments and appurtenances to the same belonging or in anywise appertaining, excepting and reserving to ourselves all gold and silver mines and five acres of every hundred acres of the said tract of land for highways. To have and to hold the above described and granted premises unto the said Alexander Macomb his heirs and assigns as a good, tenantable, established inheritance forever. On condition, nevertheless, that within the term of seven years to be computed from the date hereof, there shall be one family actually settled on said tract of land hereby granted for every 200 acres thereof. Otherwise these letters patent and the estate herewith granted shall cease, determine and become void. In testimony whereof, we have caused these our letters to be made patent and the great seal of our said State to be hereunto affixed.

Witness our trusted and well-beloved George Clinton, Esq., governor of our said State, general and commander-in-chief of all militia,

and admiral of the navy of the same, at our city of New York, this 10th day of January in the year of our Lord 1792, and in the 16th year of our Independence. Approved by the commissioners of the land office and by the secretary's office, the 10th day of January, 1792. Word in between 10th and 11th line being interlined. Lewis A. Scott, secretary. George Clinton."

37 (It was admitted that Mr. Steele was a duly appointed and acting State game and fish protector at the time of this alleged conversion, and that he assumed to act as such, and that R. U. Sherman was fish commissioner of the State of New York at that time, and one of the board of State fish commissioners.)

It was stipulated by counsel that the 12 nets set in the water were worth $15 each, and the 4 nets on shore were worth $36.

The plaintiffs here rested their case.

Defendants' counsel then moved for nonsuit. After argument of counsel, the court said: "I think there is enough with regard to the construction of this statute so that I ought to examine it; I will order a verdict against Steele for $216, and a verdict in favor of the other two defendants against the plaintiff, the whole subject to the opinion of the court under section 1185. Thereafter and at same term, the judge holding said trial term duly rendered his decision sustaining said verdict as ordered, and directing judgment to be entered for plaintiffs against defendant Steele for $216 damages, and the defendant duly excepted to said decision.

The foregoing is all the evidence and proceedings taken or had upon the trial of this action relating to the defendant Steele.

DORWIN & BROWN,
Defendants' Attorneys.

In Supreme Court.

GEORGE W. LAWTON and ANO.)
vs.
WILLIAM N. STEELE *et al.*)

Defendant Steele hereby excepts to the decision on order of Mr. Justice Williams, entered herein in Jeff. Co. clerk's office, denying said defendants' motion to set aside the verdict directed against him subject to the opinion of the court at the trial; also

38 separately excepts to that part of said decision granting plaintiffs' motion for judgment on said verdict.

DORWIN & BROWN,
Defendants' Attorneys.

Supreme Court.

GEORGE W. LAWTON and FRANK C. Mullin, an Infant, by Edward Mullin, His Guardian *ad Litem*, *vs* WILLIAM N. STEELE. } Judgment May 25, 1888.

This cause being at issue and regularly upon the calendar of the court for the circuit commencing March 26, 1888, and the same

having been tried by a jury at said term of court, and the jury by direction of the court having rendered a verdict against defendant Steele and in favor of plaintiffs for $216 subject to the opinion of the court, and the judge holding said trial term having at the same term directed that judgment be entered upon said verdict in favor of plaintiffs and against defendant Steele.

Now, on motion of E. C. Emerson, plaintiffs' attorney, it is adjudged and determined that the plaintiffs recover of defendant William N. Steele the sum of two hundred and sixteen dollars ($216) damages together with the sum of one hundred and sixty-six dollars and nine cents ($166.09) as and for their costs and disbursements of this action, amounting in all to three hundred and eighty-two dollars and nine cents ($382.09) and that the plaintiffs have execution therefor against said defendant Steele.

Judgment signed and entered May 25, 1899 at 5 p. m.

GEO. H. WALKER, *Dep. Clerk.*

Supreme Court.

GEORGE W. LAWTON and Another }
Opinion filed.
vs.
WILLIAM N. STEELE and others. }

Jefferson Circuit. Tried April 26, 1899. Decided May 22, 1899.

Action to recover damages for the conversion of fishing nets.

Tried before a jury, verdict ordered subject to the opinion of the court, for plaintiffs against defendant Steele for $216, and in favor of defendants Sargent and Sherman. The case is now to be disposed of pursuant to Sec. 1187, Code of Civil Procedure.

The facts are stated in the opinion. The nets were the property of plaintiffs and were taken away by defendants Steele and destroyed. They were worth $216. At the time of the taking most of the nets were in the waters of Black River bay, being used for fishing purposes, and the balance were on the shore of that bay, having recently been used for such purposes. The plaintiffs were fishermen. The defendant Steele was a state game and fish protector. The taking and destruction of the nets is claimed to have been justifiable under the statutes of the state relating to the protection of game and fish. The plaintiffs claim there was no justification under the statutes, and that the statutes, if in force they constitute such justification, were unconstitutional. The defendant Sherman was a state fish commissioner, and the defendant Sargent was president of the Jefferson County Fish and Game Association, and plaintiffs claim these defendants are liable on the ground they instigated, incited or directed the taking and destruction of the nets.

E. C. Emerson for plaintiffs. E. R. Brown for defendant.

WILLIAMS, J.

I hold upon the trial there was no evidence upon which the jury would be justified in rendering any verdict against the defendants Sargent and Sherman on the ground they neither instigated nor directed the taking of the nets. There cer-

tainly was no evidence to charge Sherman; and as to Sargent, I still adhere to my opinion expressed at the trial. He only requested that defendant Steele, as game and fish protector, *to* enforce any law that existed to protect the fish in Black River bay. He did not assume to direct as to what the law was, and if he is to be believed he told defendant Steele he did not think he had the right to take or destroy the nets. He did not, in my view of the evidence, by writing the letter or having the interview he had with defendant Steele, render himself liable for the taking and destruction of the nets, if such taking and destruction was unauthorized and unjustifiable. If I was wrong at the trial in taking the question of fact from the jury I cannot well correct that error now, because sec. 1185 only relates to a case where there are no questions of fact. I could not certainly order judgment against the defendant Sargent now. If I was wrong as to this defendant I should have submitted the question of fact to the jury. My refusal to do so can only be reviewed on appeal from the judgment as to these two defendants, therefore the verdict ordered will not be disturbed, but judgment thereon will be ordered.

The questions to be here considered and determined relate to the verdict ordered for plaintiffs against the defendant Steele. Defendant Steele moves to set aside that verdict and that judgment be directed for him against the plaintiffs; and this motion is opposed by plaintiffs. In order to correctly determine this motion it will be necessary to decide whether the taking and destruction of the nets was authorized and justifiable under the statutes of the State. The defendant Steele claims to have acted in taking and destroying these nets, and to have been justified in so doing, under chap. 591, Laws 1880, and chap 317, Laws 1883, and chap 141, Laws 1886.

It is provided substantially by sec. 1 of the act of 1880, that it is the duty of a State game and fish protector to enforce the statutes for the preservation of fish or any other game law; and by sec. 2 of same acts, that any net or other means devised for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found or maintained in or upon any of the
41 waters of this State, or upon the shores of any islands in any such waters, in violation of any existing or hereafter-enacted statutes or laws for the protection of fish, is hereby declared to be and is a public nuisance, and may be abated or summarily destroyed by any person; and it shall be the duty of any game and fish protector to seize and remove and forthwith destroy the same, etc., etc., and no action for damages shall lie or be maintained against any person for and on account of any such seizure or destruction.

It is provided by sec. 1 of the act of 1886 substantially, that no person shall at any time kill or take from the waters of Henderson bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar point and the boundary line between the counties of Jefferson and Oswego, or within a mile from the shore of any island in Lake Ontario, which is a part of Jefferson county, any fish of any kind by any device or means whatever, otherwise than by hook and line or rod held in the hand; and by

sec. 2, same act, that any person violating any of the provisions of this act shall be guilty of a misdemeanor, and liable to a penalty of $50 for each offense. In order to determine whether defendant Steele was authorized by the acts of 1880 and 1883 to take and destroy these nets, it is necessary to inquire whether the nets were set, put, floated, had, found or maintained in or upon any water of this State, or upon the shore of any such waters, in violation of the act of 1886. The nets were concededly in the waters and upon the shore of Black River bay, and were there in the water within a mile from the shore. Others on the shore had been used within a mile from the shore in the bay. In fact the bay is nowhere to exceed one mile wide, and therefore all fishing in the bay must be (within) one mile from the shore. If the act of 1886 prohibits fishing with nets in that bay, then the authority of the defendant Steele to take and destroy the nets, so far as the statutes could authorize it, would seem to be established. Black River bay is a bay of Lake Ontario; it extends from the mouth of Black river to the lake. It is bounded upon the one side by Pillar point, so called, in the town of Brownville, and on the other side by the town of Hounsfield and Sackett's Harbor, which is in the latter town. The harbor of the lake known as Sackett's Harbor is upon the shore of this bay. Directly adjoining Black River bay on the south, and with no
42 lake between them, is Henderson bay, upon the shore of which lies a portion of the town of Henderson and the town of Hounsfield, and in which latter bay is the harbor of the lake, known as Henderson harbor. Henderson bay is much wider than Black River bay and other smaller bays between Pillar point and the line between Jefferson and Oswego counties, and some points in Henderson bay can evidently be selected which would be more than a mile from the shore of the bay or of Lake Ontario. The plaintiffs claim the act of 1886 does not cover or include Black River bay and the other bays along the lake between Pillar point and the Oswego county line, except Henderson bay, because the latter bay alone is named in the act, the language being, "the waters of Henderson bay or Lake Ontario within one mile from the shore," between the points named. The argument is, that while "Lake Ontario," if those words alone were used, might naturally include all bays that are navigable waters, when one bay is named by words in the act, that shows the legislative intent to exclude all other bays from the act. There would nowhere be any good reason for such an intent on the part of the legislature, and therefore we naturally look to see if the language of the act is susceptible of any other reasonable construction. The naming of Henderson bay in the act must be presumed to have been done for some purpose. And if there was no other reason we might be compelled to adopt the construction contended for by the plaintiffs, upon the theory that the legislature intended in the term "Lake Ontario" to include all bays that are navigable waters. Are the words "Henderson bay" useless and unnecessary? It seems to me not. If Henderson bay was not named in the act, but it read merely, "The waters of Lake Ontario within one mile from the shore," there would still remain

some parts of Henderson bay that would be more than a mile from the shore, and in which fishing with nets would still be allowed. This would not be true of any other bay between the points designated in the act. I am led to believe, therefore, the reason this bay was specifically named in the act, was that the legislature intended and desired to cover the whole of Henderson bay by the act, which could not be done by the other language used in the act, without expressly naming the bay. Unless this be true, why
43 was Pillar point fixed as one of the points between which the shores of the lake were bounded? Why not say, "the waters of Henderson bay and of Lake Ontario between—the line between the counties of Jefferson and Oswego"? There was no lake shore north of Henderson bay toward Pillar point except Black River bay. It is possible the legislature in passing the act in question may have had no particular intent at all. That form of the act may have been the result of carelessness in drafting, or of amendments made while the bill was before the legislature, the outgrowth of severe opposition and feeling well understood to have existed between the sportsmen and the fishermen so called. We are compelled, however, to consider what was the legislative intent as indicated by the language used; and it seems to me such intent must have been as I have indicated. In this construction I read the words "within one mile of the shore" as applying alone to the words Lake Ontario; so as to prohibit the fishing in the whole of Henderson bay and of Lake Ontario within a mile from the shore only.

It is suggested by plaintiffs' counsel that the act of 1886 does not prohibit the using of nets in the water or on the shore for the purpose of taking fish in the designated waters, but merely prohibits the taking of the fish; and therefore the nets were not then in violation of the law. If it was a violation of law to take the fish in those waters with nets, was a misdemeanor, then attempting to take the fish with nets and having the nets there for such purpose is a crime (Penal Code, sec. 34 and 686), and therefore the nets would be there in violation of law, or of the statute. My conclusion, therefore, is that under the proofs of the case, and the statutes in question, the defendant Steele was authorized and justified in taking and destroying the nets, provided the statutes were constitutional.

While the trial court should not in my judgment readily hold an act of the State unconstitutional, question the power of the legislature to pass the act, but leave that duty to be performed by the appellate courts; yet the plaintiffs' counsel is so persistent in his argument against the validity of these statutes, and the case is likely to be determined sooner or later upon the sole ground of the validity of the statutes under the State and Federal constitutions, that I
44 ought very likely to give some attention to this question, and endeavor to make such a disposition of the case as will well be approved and sustained by the appellate courts, to which the case is likely to be carried.

First, as to the act of 1886, prohibiting the taking of fish with nets in certain waters, and making such taking a misdemeanor, it

is said the legislature had no power to pass this act, because fishing with nets was a lawful, industrial pursuit which the citizen had a right to follow, and which he could not rightfully be prohibited from following; and the act, therefore, was an unconstitutional interference with the liberty and privileges of the citizen. The cases principally relied upon by plaintiff to sustain this proposition are:

Matter Application Jacobs, 98 N. Y., 98.
The People *ex* Marx, 99 N. Y., 377.
The People *ex* Arensburg, 105 N. Y., 123.
The People *ex* West, 106 N. Y., 293.
The People *ex* Kibler, 106 N. Y., 321.

And the cases therein referred to and considered. It is well to understand just what these cases are and what they decide.

The Jacobs case involved the constitutionality of "Act (chap. 272, Laws 1884) to improve the public health, by prohibiting the manufacture of cigars and preparation in any form in tenement-houses, in certain cases, and regulating the use of tenement-houses in certain cases," and it was held that while generally it is for the legislature to determine what laws are required to protect and secure the public health, comfort and safety, yet under the guise of public regulation it may not arbitrarily infringe upon personal or property rights, and its determination as to which is a proper exercise of authority is not final or conclusive, but is subject to the scrutiny of the courts; and when it passes an act ostensibly for the public health, but which does not relate to, and is inappropriate for the purpose, and which destroys the property and interferes with the rights of the citizen, it is within the province of the court to determine this fact, and to declare the act violative of the constitutional guaranties of those rights; and the act in question was held unconstitutional because it did not relate to, or protect or secure the public health, was inappropriate for that purpose, and it did interfere with the rights of the citizen, by prohibiting the
45 carrying on of a legitimate business, which in no manner interfered with the health, comfort, safety or welfare of society. The prohibition applied only to the cities of New York and Brooklyn, and yet if the business affected the public health it would have done so in other cities of the State as well. The act not only interfered with the business to be carried on relating to cigars and tobacco, but also to the leasing of tenement-houses and the profitable use thereof to the lessor as well as the lessee. The act was really designed to protect some manufacturers of cigars against the cheaper manufacture thereof, which is not within the province of the legislature.

The Marx case involved the constitutionality of "sec. 6 of an act (chap. 202, Laws 1884,) to prevent deception in the sale of dairy products." And it was held the section which prohibited the manufacture or sale as an article of food of any article designed to take the place of butter or cheese, produced from pure, unadulterated milk or cream, from any oleaginous substance or compound of the same, other than that produced from such adulterated milk or

cream, was unconstitutional, because it prohibited its manufacture and sale of a substitute for butter or cheese, however wholesome, valuable or cheap, and however openly and fairly the character of such substitute might be owned or published. In other words, that without any element in the section of a design to deceive, it prohibited the manufacture openly of a cheap substitute for butter and cheese. The court saw the design of the section was clearly not to prevent fraud and deception, but to protect the dairy industry of the State againt the substitution of a cheaper article from cheaper materials than real butter and cheese, which was not within the power of the legislature. The same principle thus underlies this case as the Jacobs case. The acts both were designed, not to protect the public against any attempted injury, fraud or deceit, but to protect one peculiar business or industry or branch thereof at the expense and to the detriment of another. This interfered with the liberty and rights of the citizen and was unconstitutional.

The Arensburg case involved the constitutionality of sec. 7 of chap. 183, Laws 1885, "An act to prevent deception in the sale of dairy products," and it was held the section which prohibited the manufacture or sale of any product not made from unadul-
46 terated milk or cream, but made in imitation or semblance of dairy butter was constitutional because it was designed to prevent fraud and deception being practiced on the public. This distinction (which I have suggested) was expressly made by the court between the Jacobs and Marx cases and this case.

The West case involved the constitutionality of sec. 3 of the same act considered in the Arensburg case; and it was held the section which prohibited the selling or bringing of any milk diluted with water or adulterated, or skimmed milk, etc., to any butter or cheese manufactories to be manufactured into butter or cheese, was constitutional, because it, like sec. 7 in the Arensburg case, was designed to prevent fraud and deception being practiced on the public or the patrons of such factory.

The Kibler case involved the constitutionality of sec. 1 of the same act considered in the Arensburg and West cases, and it was held the section which prohibited the sale, exchange, or exposing for sale or exchange of any unclean, impure, unhealthy, adulterated or unwholesome milk, was constitutional. It was designed to protect the public against deception and to preserve the public health also.

It is not difficult to understand the principle underlying these cases, and the only question is whether they throw any light upon the validity of the statue we are here considering. If the sole object of this act is to prohibit the carrying on of an otherwise legitimate business, fishing with nets in the interest and for the benefit of another class of persons, the fishing with nets being injurious to no public common right, then its validity cannot be maintained. The theory of the defendant Steele and of the public he officially represents, however, is that the right of fishing in the navigable waters of Lake Ontario and its bays and harbors is public and common to all

the citizens of the State; that fishing with nets is injurious to such public and common right, in that it tends to destroy the supply of fish, and that the State has the power to regulate the extent and manner of fishing so as to protect equally the public and common right of all the citizens of the State to take fish from these waters. The only authority in this State to which my attention is called relating to this question directly is the case of Smith *vs.* Levinus, 8 N. Y., 472. This case involved the constitutionality of "An act (chap.
47 194, Laws 1849,) to vest in the board of supervisors certain legislative powers," etc. By sec. 4, subd. 13, it was provided the said boards of supervisors should have power and were authorized to make such laws and regulations as they should deem necessary, and provide for the enforcing of the same: To provide for the protection of all kinds of shell and other fish within the waters of their respective counties. The board of supervisors of Queens county, under this act, passed an ordinance that no person should take oysters from any of the public waters of the county by means of the process known as dredging, under the penalty of $100 for each offense. This action was brought to recover such a penalty. The court held the act was constitutional, saying: "The people in their sovereign, corporate capacity, own the beds of all navigable waters within the State. They are held for the common benefit and to promote the convenience and enjoyment of all the citizens. One of the purposes for which the people own the beds of such waters is to protect and regulate the rights of fishing in them. The legislature may make such laws for this purpose as it deems most beneficial to the common enjoyment of the right, in the same manner that it may for the public convenience authorize*d* wharves to be erected upon navigable waters. So it doubtless may for commercial purposes authorize the filling up of a part of a bed of a stream or cove which prevented a desirable fishing place. All these powers are within the scope of legislation."

In State *vs.* Roberts, 59 N. Y., 256, (sec. 47,) American R. 199, which was an indictment for taking fish from navigable waters out of the season prescribed by statute, it was said by the court, "At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tend to the destruction of the privileges or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised and so beneficially for the public that it ought not now to be called in question."

48 In Smith *vs.* State Maryland, 18 How., U. S., 71, the validity of an act of the legislature of the State of Maryland was involved. It was "An act to prevent the destruction of oysters in the waters of the State," and provided it should be unlawful to take

or catch oysters in any of the waters of the State with a scoop or drag or any other instrument than with such tongs and rakes as were then in use and authorized by law; and forbidding all persons to use such instruments on pain of forfeiting to the State the boat or vessel employed for the purpose, etc. The Supreme Court of the United States held there was the public and common right of taking fish in Chesapeake bay, as well shell fish as floating fish, and the State had a right to protect this fishing by making it unlawful to take or catch oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in the pursuit and that the law was constitutional. It may be said perhaps of this case, that the ground urged why the law under consideration is invalid, was not among those urged in that case, that it interfered with the liberty of the citizen the right to carry on an otherwise legitimate business. It was said by the court in that case that the State might forbid all such acts as would render the public right of fishing less valuable or destroy it altogether; and that the power resulted from the ownership of the soil under the water, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil was held that the power had been exercised in many of the States; that the act in question had for its avowed and real object to prevent the destruction of oysters within the State, by the use of particular instruments in taking them; that it did not touch the subject of the common liberty of taking oysters, except for the purpose of guarding it from injury, to whomsoever it might belong, and by whomsoever it might be enjoyed; that the law might be correctly said to be not in conflict with, but in furtherance of any and all public rights of taking oysters whatever they might be. I entertain no doubts, after an examination and consideration of these authorities, but that the act of 1886 in question, was within the power of the legislature to enact and violate no constitutional provision. Its object was not to prohibit fishing, but to prescribe the manner in which it might be done and
49 to prohibit its being done by nets. The avowed object in the passage of the act was to preserve the fish, and prevent the injury or the destruction of the fishing in the waters covered by the act. Whether the act was more severe than necessary to accomplish the object sought, it was the province of the legislature itself to determine; and the court has, I think, no power to declare the act invalid because it thinks a less rigid law would have answered the purpose sought to be accomplished.

As to the acts of 1883, providing the nets illegally used were a public nuisance, and might be abated and summarily destroyed, and it should be the duty of any game and fish protector to seize, remove, and forthwith destroy the same, and that no action for damages should lie or be maintained therefor; it is said the legislature had no power to pass these acts, because they authorize one person to deprive another of his property without due process of law. The statute would seem to be objectionable upon the ground stated, unless it can be upheld under the police power, for it does not provide for the summary destruction of the nets, and therefore

the taking of the property from the owner of the nets without due process of law. The statute expressly provides and declares the nets to be public nuisances, and therefore authorizes and directs their destruction; and the only question is whether there was power in the legislature to declare them public nuisances. Unless this power existed the legislature could not direct their destruction summarily and without any legal proceedings, in which the owners of the nets should have a chance to be heard and should have their day in court.

In Coe *vs.* Shults, 47 Barb., 64, the principles of the law applicable to the subject of public nuisances and the abatement thereof, was considered by Judge Sutherland at special term. He said: "At common law a very concise definition of a public or common nuisance was, that it was a public annoyance; but a more extended definition was, an offense against the public, either by doing a thing which tends to the annoying of the public and common against all, or by neglecting to do a thing which the common good requires. It was a principle of the common law, that any one might abate or remove a public nuisance without staying to have the thing abated or removed, found to be a nuisance by a jury, or in or by any preliminary legal proceedings. Of course any one who undertook even in good faith thus summarily to abate a public nuisance of his own motion, by his own act showed that he regarded and declared the thing stated to be a nuisance. But he, nevertheless, took upon himself by his act the risk of being able to show in a proper action by the party whose interests were injuriously affected, that the thing abated was a public nuisance. No one has probably ever suggested that Magna Charta interfered with the process of summarily abating a public nuisance. If the abatement involved the deprivation of property, the owner was deprived of his property 'by due process of law,' if the thing abated was a public nuisance, for there the summary proces of abatement was authorized by the common law, and any process authorized by law must be due process. I am not willing to concede that the legislature can create a public nuisance, or a new definition of a public nuisance unknown to the common-law decisions, or declare an act or anything a common nuisance which palpably, according to our present experience or information, is not and cannot be under any circumstances a common nuisance, by the common-law definition or common-law decision. By such an unlimited power it is easy to see that any citizen might be deprived of his property without compensation and without any tolerable pretext the public good required such deprivation."

This language, or some of it, was cited with approval by Judge Earl in the Jacobs case, as hereinbefore referred to. In that case the police power was sought to be upheld for the promotion of the public health, welfare and safety, and it was said, "The police power is not without limitations and that in its exercise must respect the fundamental rights guaranteed by the Constitution. If this were otherwise the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the in-

terest of the health, the welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier be swept away. Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to re-
51 view by the courts, but they must have some relation to these ends. Under the guise of police regulation personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health and thereby destroy or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health."

In matter of petition of Cheesebrough, 78 N. Y., 232, the subject of the police power was discussed in considering the drainage act, and it was said: "The police power possessed by the State and conferred upon municipal corporations is very broad and far-reaching, and it is impossible to place upon it any precise limitations. By its exercise in many cases rights of property and of person may be interfered with and largely impaired, without any compensation. Nuisances may be abated by private persons without any liability to damages, and by the public without making any compensation, because no one has the legal right to maintain a public nuisance. In cases of actual necessity, as that of preventing the spread of fire, the ravages of pestilence, the advance of a hostile army, or any other great calamity, the private property of any individual may be lawfully taken, used, or destroyed for the general good without subjecting the actors to personal responsibility. In such cases the rights of private property must be made subservient to the public welware; and it is the imminent danger and the actual necessity which furnishes the justification. It is under the police power that municipal corporations make ordinances to preserve health, prevent fires, regulate the use and storing of dangerous articles, establish and control markets, regulate the burial of the dead, and the like; and this police power may generally be exercised without making compensation for property and rights interfered with."

I am unable to see, under the principles I have quoted, how the act in question can be upheld under the so-called "police power" of the State.

It will not do to say the legislature has the power arbitrarily to declare property a "public nuisance" and authorize its sum-
52 mary seizure and destruction. Such a doctrine would permit the legislature to violate every private right of property, and the enjoyment thereof guaranteed by the constitution. Nor do I think the mere fact the property is used in the commission of crime entitles the legislature to declare it a "public nuisance," and authorize its summary destruction. The legislature cannot declare that property to be a public nuisance which is clearly not such, and

for the immediate destruction of which there is no necessity whatever. Fishing nets are not and cannot be considered in and of themselves "public nuisances." It is only the illegal use made of them that disturbs the public or interferes with its rights. There can be no immediate necessity of requiring these nets, even if they are being illegally used, to be summarily destroyed. The legislature might just as safely to the public have provided further seizure and detention until it should be judicially determined they were being used in violation of the law, and should be ordered destroyed before its destruction should take place, as to make this provision for summary destruction. This would not be true of property which the public health required to be destroyed, or the public safety from fire or pestilence or some other things, clearly within the "police power" of the State. I am clearly of the opinion the legislature exceeded its powers under the Constitution in these provisions of the acts in question, and in these respects the acts are invalid. This conclusion leads to the determination of the present application adversely to the defendant Steele. These acts being invalid afforded him no protection for the taking and destruction of the nets. The taking and destruction were therefore illegal, and the defendant Steele is liable in this action to plaintiff for the value thereof. The verdict ordered against him at the trial will not therefore be disturbed, but judgment will be ordered thereon.

Counsel will agree upon the form of order in accordance with the views expressed in this opinion, and same will be presented to me for signature. Ten dollars costs of motion allowed to prevailing parties; that is, to such as are entitled to have costs against the others.

53 Supreme Court.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by EDWARD MULLIN, His Guardian *ad Litem*, *vs.* WILLIAM N. STEELE, EDWARD L. SARGENT, and RICHARD U. SHERMAN. } Statement under Rule 41.

Action commenced by service of summons and complaint July 30th, 1887.

Answer served September 29th, 1887.

Names of original parties are given in full above and no change has been made thereon.

54 At a general term of the supreme court, held at Utica in and for the fourth judicial department on February 12, 1889.

Present: Hon. George A. Hardin, presiding justice; Hon. Celora E. Martin, associate justice.

GEORGE W. LAWTON *et al.*, Respondents, *vs.* WILLIAM N. STEELE, Appellant.

An appeal from the judgment entered in this action on the verdict at the Jefferson circuit and the opinion of Mr. Justice Williams

having been argued at the November term of this court at Binghampton by Elon R. Brown for appellant, and Edgar C. Emerson for respondents, and due consideration of the record and of the arguments of counsel having been had and the said court having handed down a memorandum of its decision reversing said judgment and ordering a new trial with costs to abide the event.

Now on motion of Dorwin & Brown, appellant's attorneys, it is ordered that the said judgment be and the same is hereby reversed and that a new trial be had with the cost of the action to abide the event.

Filed April 3, 1889.

At a general term of the supreme court, held at the court-house in the city of Utica, Oneida county, in and for the fourth judicial department, of the State of New York, commencing on the 12th day of February, 1889.

Present: Hon. George A. Hardin, presiding justice; Hon. Celora E. Martin, associate justice.

55 GEORGE W. LAWTON and Another, Respondents,
vs.
WILLIAM N. STEELE, Appellant.

Judgment and order reversed and a new trial ordered with cost to abide the event.

Per curiam opinion filed with the clerk of Oneida county.

Merwin, J., not sitting.

[L. S.] A true copy.

A. F. CLARK,
Deputy Clerk.

Filed April 3, 1889.

Supreme Court.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by His Guardian *ad Litem*, Respondents,
vs.
WILLIAM N. STEELE, Appellant.

The appeal taken by the defendant in above-entitled action having been heard at a general term of this court held at the city of Binghampton in and for the fourth judicial department in September, 1888, and an order of said general term having been made and entered on the 3d day of April, 1889, in the clerk's office of Jefferson county, reversing the said judgment entered in this action in favor of plaintiffs and against defendant on the 25th day of May, 1888, for $216 damages and $166.09 costs, and ordering a new trial with costs to abide event.

Now on motion of Dorwin & Brown, attorneys for the defendant and appellant, it is hereby adjudged that the said judgment appealed from and above described be and the same is hereby reversed and a new trial ordered with costs to abide the event of such new trial.

Judgment signed and entered this 3d day of April, 1889, at 2 p. m.
GEO. H. WALKER,
Deputy Clerk.

Filed April 3, 1889, 2 p. m.

56 At a general term of the supreme court in and for the fourth judicial department of the State of New York, held at the city of Utica, Oneida county, on the 23 day of February, 1889.

Present: Hon. Geo. A. Hardin, justice presiding
" Celora E. Martin, } associate justices.
" Milton H. Merwin, }

GEORGE W. LAWTON *et al.*, Respondents, }
vs.
WILLIAM N. STEELE, Appellant. }

An appeal having been brought to this court from a judgment rendered in above-entitled action in favor of plaintiffs and against defendant, and said appeal having been duly heard and an order having been duly made at this term in the above-entitled action reversing the judgment so appealed from and ordering a new trial, and it appearing that this case involves questions of law which ought to be reviewed by the court of appeals.

It is, on motion of E. C. Emerson, of counsel for plaintiffs, ordered that an appeal by plaintiffs to the court of appeals from the judgment and order reversing the judgment for plaintiffs and granting a new trial in this action made at this term of court, as aforesaid, be and the same is hereby allowed and leave to bring said appeal is hereby granted, on the ground that a question of law is involved which ought to be reviewed by the court of appeals.

Filed April 2, 1889.

Supreme Court, General Term, Fourth Department.

GEORGE W. LAWTON and Another, Respondents, } Opinion General
vs. } Term, Feb.
WILLIAM N. STEELE, Appellant. } 23d, 1889.

57 Action for damages by George W. Lawton and another against William N. Steele, judgment for plaintiff, and defendant appeals.

Elon R. Brown, for appellant.

E. C. Emerson, for respondent.

Per Curiam. We concur in the opinion delivered at special term as to all the questions involved in this case except the constitutionality of chapter 591, Laws 1880, as amended by laws 1883, c. 317. At special term it was held that that statute was unconstitutional. We think the statute in question is not violative of the provision of the Constitution which declares that no person shall be deprived of life, liberty or property without due process of law. We are of the opinion that the legislature, by virtue of the police power of the State, with which it is vested, was authorized to pass the statute

under consideration, and that it is valid, and should be upheld Smith *vs.* Levinus, 8 N. Y., 472; Smith *vs.* Maryland, 18 How., 71; Phelps *vs.* Racey, 60 N. Y., 10; State *vs.* Snover, 42 N. J. Law, 341; Williams *vs.* Blackwall, 2 Hurl, &c., 33; Blazier *vs.* Miller, 10 Hun, 435; Hinckley *vs.* Emerson, 4 Cow., 351; Brown *vs.* Hoburger, 52 Barb., 25; People *vs.* Cipperly, 37 Hun., 324, affirmed on dissenting opinion of Learned, J., 101 N. Y., 634; 4 N. E. Rep., 107.

The judgment recovered was for $216 damages, being for the value of 16 fish nets destroyed by the defendant. Twelve of these nets were found set in the waters of Black River bay, in violation of the statute for the preservation of the fish therein. The other four were not set in the water, but were found on Perch River bridge, and were worth $36. The defendant had no right to destroy the four nets which were not in illegal use. This was conceded. Hence we conclude that, while the plaintiffs were entitled to a judgment against the defendant for $36 damages, they were not entitled to the judgment awarded, and that the judgment and order appealed from should be reversed, and a new trial granted, with costs to abide the event.

58 At a special term of the supreme court held at the courthouse in the city of Watertown, in and for the county of Jefferson, on the 4 day of March, 1890.

Present: Hon. P. C. Williams, justice, presiding.

In Supreme Court.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by EDWARD MULLIN, His Guardian *ad Litem*,
vs.
WILLIAM N. STEELE.

On reading the remittitur of the court of appeals in this action affirming the judgment of the general term directing a new trial herein and directing judgment absolute with costs in favor of the defendant on the plaintiffs' stipulation, and on reading the affidavit of Elon R. Brown, dated March first, 1890, on motion of Elon R. Brown, attorney for the defendant, E. C. Emerson, plaintiffs' attorney, opposed.

It is ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the defendant, William N. Steele, have an extra allowance in this action of five per cent. upon $560, which was claimed to be recovered in this action, on the ground that the same is a difficult and extraordinary action.

Enter. WILLIAMS, *J.*

A copy.

GEO. H. WALKER, *Dep. Clk.*

59 In Supreme Court.

GEORGE W. LAWTON and FRANK C. MULLIN, an Infant, by Edward Mullin, His Guardian *ad Litem*,
vs.
WILLIAM N. STEELE.

Judgment March 5th, 1890, 1.30 p. m.

On reading and filing the remittitur of the court of appeals and the order of the special term directing that the same be made the judgment of the supreme court, and on motion of Elon R. Brown, attorney for the defendant, William N. Steele—

It is hereby ordered and adjudged that the judgment heretofore entered in this action in Jefferson county clerk's office on the decision of the general term directing that a new trial be had in the action be, and the same is hereby, confirmed.

And it is further adjudged upon the plaintiffs' stipulation given upon their appeal to the court of appeals, that judgment absolute be had against them and the complaint dismissed, and that the defendant, Steele, recover of the said plaintiffs the sum of three hundred and seventy-seven dollars and thirty-six cents, as and for his costs herein and have execution therefor.

GEO. H. WALKER, *Dep. Clerk.*

60 JEFFERSON CO. CLERK'S OFFICE.

Filed March 5, 1890, 1.30.

GEO. H. WALKER, *Dep. Clerk.*

61 FEBRUARY 25TH, 1890.

GEORGE W. LAWTON & ANO., Appellants,
v.
WILLIAM N. STEELE, Respondent.

E. C. Emerson, for appellants.
Elon R. Brown, for respondent.

ANDREWS, *J.:*

The conclusions of the trial judge that Black River bay is a part of Lake Ontario within the meaning of chap. 146 of the Laws of 1886, and that the nets set therein were set in violation of the act, chap. 591, of the Laws of 1880, as amended by chap. 317 of the Laws of 1883, were affirmed by the general term. The trial judge, in his careful opinion, demonstrated the correctness of these conclusions, and nothing can be added to reinforce the argument by which they were sustained.

The point of difference between the trial court and the general term relates to the constitutionality of the section of the act of 1880, as amended in 1883. That section is as follows: "Sec. 2. Any net found, or other means or device for taking or capturing fish or whereby they may be taken or captured, set, put, floated, had, found, or maintained in or upon any of the waters of this State, or upon the shores or islands in any waters in this State, in violation of any existing

or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be and is a public nuisance and may be abated and summarily destroyed by any person, and it shall be the
62 duty of each and every (game and fish) protector aforesaid, and of every game constable, to seize and remove and forthwith destroy the same, and no action for damages shall be maintained against any person for or on account of any such seizure and destruction."

The defendant justified the seizure and destruction of the nets of the plaintiffs as a game-protector under this statute, and established the justification if the legislature had the constitutional power to authorize the summary remedy provided by the section in question. The trial judge held the act in this respect to be unconstitutional, and ordered judgment in favor of the plaintiffs for the value of the nets. The general term sustained the constitutionality of the statute and reversed the judgment. We concur with the general term for reasons which will now be stated.

The legislative power of the State which, by the constitution is vested in the senate and assembly (sec. 1, art. 3), covers every subject which in the distribution of the powers of government between the legislative, executive, and judicial departments, belongs by practice or usage in England or in this country to the legislative department, except in so far as such powers have been withheld or limited by the constitution itself, and subject also to such restrictions upon its exercise as may be found in the Constitution of the United States. From this grant of legislative power springs the right of the legislature to enact a criminal code, to define what acts shall con-
63 stitute a criminal offense, what penalty shall be inflicted upon offenders, and generally to enact all laws which the legislature shall deem expedient for the protection of public and private rights, and the prevention and punishment of public wrongs.

The legislature may not declare that to be a crime which in its nature is, and must be under all circumstances innocent, nor can it in defining crimes or in declaring their punishment transgress any fundamental right secured by the Constitution; but it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This in its nature is a legislative power which by the constitution of the State is committed to the discretion of the legislative body. Barker *v.* People, 3 Cow., 686; People *v.* West, 106 N. Y., 293.

The act in question declares that nets set in prohibited waters are public nuisances and authorizes their summary destruction. The statute declares and defines a new species of public nuisance not known to the common law nor declared to be such by any prior statute; but we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances or from declaring places or property used to the detriment of public interests or to the injury of the health, morals, or welfare of the community public nuisances, although not such at common law. There are, of course, limitations upon the exercise

of this power. The legislature cannot use it as a cover for
64 withdrawing property from the protection of the law or arbitrarily where no public right or interest is involved declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion or was framed for the purpose of individual oppression it will set it aside as unconstitutional, but not otherwise. *In re* Jacobs, 98 N. Y., 98; Harlan, J., Mugler *v.* Kansas, 123 U. S., 661.

There are numerous examples in recent legislation of the exercise of the legislative power to declare property held or used in violation of a particular statute a public nuisance, although such possession and use before the statute was lawful. The prohibitory legislation relative to the manufacture or sale of intoxicating liquors in various States has in many cases been accompanied by provisions declaring the place where liquor is unlawfully kept for sale, as well as the liquor itself, a common or public nuisance; and while the validity of prohibitory statutes in their operation upon liquors lawfully acquired or held before their passage and in respect of the procedure authorized thereby have been the subject of much contention in the courts, the right of the legislature by a new statute to impose upon property held or used in the violation of law the character of a public nuisance is generally admitted. See Wynehamer *v.* People, 13 N. Y., 378; Fisher *v.* McGirr, 1 Gray, 1; Mugler *v.* Kansas, *supra*. The law-making power is not exhausted by a single exercise nor limited to subjects covered by the common law.

The legislative power to regulate fishing in public waters
65 has been exercised from the earliest period of the common law. The statute, 2 H., 6, c. 15, prohibited the use of nets in the Thames if they obstruct navigation or the passage of fish. Lord Hale in his treatise, De Jure Maris, page 23, says that "fishing which the subject has in this or any other public or private river or creek, fresh or salt, is subject to the laws for the conservation of fish and fry, which are many." In this State many statutes have been enacted, commencing at an early period, regulating the right of fishing in the waters of the State, prohibiting the use of nets or the taking of fish at certain seasons, and for the protection of certain kinds of fish. 1 Rev. St., ed.'s ed., 687 *et seq.*; 4 *id.*, p. 96 *et seq.* It has become a settled principle of public law that power resides in the several States to regulate and control the right of fishing in the public waters within their respective jurisdictions. Smith *v.* Maryland, 18 How., U. S., 71; Hooker *v.* Cummings, 20 John., 101; Smith *v.* Levinus, 8 N. Y., 472; 3 Kent, Com., 415.

We think it was competent for the legislature in exercising the power of regulation of this common and public right to prohibit the taking of fish with nets in specified waters, and by its declaration to make the setting of nets for that purpose a public nuisance. The general definition of a nuisance given by Blackstone, vol. 3, p. 215, is "anything that worketh hurt, inconvenience, or damage." It is generally true, as stated by a recent writer (Wood on Nuisances, sec.

11), that nuisances arise from the violation of the common
66 law and not from the violation of a public statute; but this, we conceive, is true only where the statute creates a right or imposes an obligation and affixes a penalty for its violation or gives a specific remedy which by the terms of the statute or by construction is exclusive—see Bulbrook *v.* Goodere, 3 Burr., 1770; but the principle stated has no application where the statute itself prescribes that a particular act or property used for a noxious purpose shall be deemed a nuisance.

The legislature in the act in question, acting upon the theory and upon the fact (for so it must be assumed) that fishing with nets in prohibited waters is a public injury, have applied the doctrine of the common law to a case new in instance, but not in principle, and made the doing of the prohibited act a nuisance. This we think it could lawfully do. The more difficult question arises upon the provision in the second section of the act of 1883 which authorizes any person and makes it the duty of the game-protector to abate the nuisance caused by nets set in violation of law by their summary destruction. It is insisted that the destruction of nets by an individual or by an executive officer so authorized without any judicial proceeding is a deprivation of the owner of the nets of *this* property without due process of law, in contravention of the Constitution. The right of summary abatement of nuisances without judicial process or proceeding was an established principle of the common law long before the adoption of our constitution, and it has never been supposed that this common-law prin-
67 ciple was abrogated by the provision for the protection of life, liberty, and property in our State constitution, although the exercise of the right might result in the destruction of property. This question was referred to by Sutherland, J., in Hart *v.* The Mayor, &c., 19 Wend., 590. He said: "If this is a case in which the corporation or any other person had a right summarily to remove or abate this obstruction, then the objection that the appellants by this course of proceeding may be deprived of their property without due process of law or trial by jury has no application. Formal legal proceedings and trial by jury are not appropriate to and have never been used in such cases." See, also, opinion of Edmonds, Senator, in S. C., pg. 609. In the license-tax cases (5 How. U. S., 504) Judge McLean, speaking of this subject, said: "The acknowledged police power of a State often extends to the destruction of property. A nuisance may be abated. Everything prejudicial to the health and morals of a city may be removed." In Rockwell *v.* Nearing (35 N. Y., 308) Porter, J., speaking of the constitutional provision, said: "There were many examples of summary proceedings which were recognized as due process of law at the date of the Constitution, and to them the prohibition has no application." Quarantine and health laws have been enacted from time to time from the organization of our State government authorizing the summary destruction of infected cargo, clothing, or other articles by officers designated, and no doubt has been suggested as to their constitutionality.
68 In Hart *v.* The Mayor (*supra*) a question was raised as to the

validity of a city ordinance subjecting a float moored in the Albany basin to summary seizure and sale upon failure of the owner to remove the same after notice. The court held the ordinance to be void, as not within the power conferred upon the city by its charter, but it was held that the common-law right of abatement existed, although the removal of the float in question involved its destruction. Van Wormer *v.* The Mayor (15 Wend., 263) sustained the right of the corporation to dig down a lot in the city to abate a nuisance, although in the process of abatement buildings thereon were pulled down. In Meeker *v.* Van Rensselaer (15 Wend., 397) the court justified the act of the defendant, as an individual citizen, in tearing down a filthy tenement-house, which was a nuisance, to prevent the spread of the Asiatic cholera.

These authorities sufficiently establish the proposition that the constitutional guaranty does not take away the common-law right of abatement of nuisances by summary proceedings without judicial trial or process; but in the process of abating a nuisance there are limitations both in respect of the agencies which may be employed and as to what may be done in execution of the remedy. The general proposition has been asserted in text books and repeated in judicial opinions that any person may abate a public nuisance, but the best-considered authorities in this country and England now hold that a public nuisance can only be abated by an individual where it obstructs his private right or interferes at
69 the time with his enjoyment of a right common to many—as the right of passage upon the public highway—and he thereby sustains a special injury. (Brown *v.* Perkins, 12 Gray, 89; Mayor of Colchester *v.* Brooke, 7 Q. B., 339; Dimes *v.* Petley, 15 *id.*, 276; Fort Plain Bridge Co. *v.* Smith, 30 N. Y., 44; Harrower *v.* Ritson, 37 Barb., 301.)

The public remedy is ordinarily by indictment for the punishment of the offender, wherein on judgment of conviction the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. But the remedy by judicial prosecution *in rem* or *in personam* is not, we conceive, exclusive where the statute in a particular case gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished. There are nuisances arising from conduct, which can only be abated by the arrest and punishment of the offender, and in such cases it is obvious that the legislature could not directly direct the sheriff or other officer to seize and flog or imprison the culprit. The infliction of punishment for crime is the prerogative of the court and cannot be usurped by the legislature. The legislature can only define the offense and prescribe the measure of punishment where guilt shall have been judicially ascertained. But as the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement, by executive officers without the intervention of judicial proceedings, in cases anal-
70 ogous to those where the remedy by summary abatement existed at common law. Marvin, J., in his able opinion in Grif-

fith *v.* McCullom (46 Barb., 561), speaking of the remedy for the abatement of nuisances, says: "That which is exclusively a common-law or public nuisance cannot be abated by the private acts of individuals. The remedy is by indictment or criminal prosecution, unless the statute has provided some other remedy."

The cases of Hart *v.* The Mayor, &c. (*supra*), Van Wormer *v.* Albany (*supra*), and Meeker *v.* Van Rensselaer (*supra*), show that the public remedy is not in all cases confined to a judicial prosecution. But the remedy by summary abatement cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it. And here lies, we think, the stress of the question now presented. It cannot be denied that in many cases a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing and of impure and unwholesome food are plainly of this description. They are nuisances *per se*, and their abatement is their destruction. So also there can be little doubt, as we conceive, that obscene books or pictures, or implements only capable of an illegal use, may be destroyed as a part of the process of abating the nuisance they create if so directed by statute. The keeping of a bawdy house, or a house for the resort of lewd and dissolute people, is a nuisance at common law. But the tearing down of the building so kept would not be justified as the exercise of the power of
71 summary abatement, and it would add nothing, we think, to the justification that a statute was produced authorizing the destruction of the building summarily as a part of the remedy. The nuisance consists in the case supposed in the conduct of the owner or occupants of the house in using or allowing it to be used for the immoral purpose, and the remedy would be to stop the use. This would be the only mode of abatement in such case known to the common law, and the destruction of the building for this purpose would have no sanction in common law or precedent. (See Babcock *v.* City of Buffalo, 56 N. Y., 268; Barclay *v.* Commonwealth, 25 Pa. St., 503; Ely *v.* Supervisors, &c., 36 N. Y., 297.)

But where a public nuisance consists in the location or use of tangible personal property so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany basin (9 Wend., 571) or the nets in the present case, the legislature may, we think, authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner; but the legislature could not go further. It could not decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong nor even, we think, to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is
72 that due process of law requires a hearing and trial before punishment or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of

exercising the power of summary abatement of nuisances the legislature cannot take into its own hands the enforcement of the criminal or quasi-criminal law. See opinion of Shaw, Ch. J., in Fisher *v.* McGirr, *supra*, and in Perkins *v.* Brown, 12 Gray, 89.

The inquiry in the present case comes to this—whether the destruction of the nets set in violation of law authorized and required by the act of 1883 is simply a proper, reasonable, and necessary regulation for the abatement of the nuisance or transcends that purpose and is to be regarded as the imposition and infliction of a forfeiture of the owner's right of property in the nets in the nature of a punishment. We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of nets so placed is a reasonable incident of the power of the abatement of the nuisance. The owner of the nets is deprived of his property, but not as the direct object of the law, but as incident to the abatement of the nuisance. Where a private person is authorized to abate a public nuisance, as in case of a house built in a highway or a gate across it which obstructs and prevents his passage thereon, it was long ago held that he was not required to observe particular care in abating the nuisance, and that although the gate might have been opened without cut-
73 ting it down, yet the cutting down would be lawful—Lodie *v.* Arnold, 2 Salk., 458, and cases cited—but the general rule undoubtedly is that the abatement must be limited by necessity and no wanton and unnecessary injury must be committed. 3 Bl., pg. 6, note. It is conceivable that nets illegally set could with the use of care be removed without destroying them; but in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the legislature could adjudge their destruction as a reasonable means of abating the nuisance.

These views lead to an affirmance of the order of the general term. The case of Weller *v.* Snover (42 N. J. L., 341) tends to sustain the conclusion we have reached. The action in that case was trespass for entering the plaintiff's lands bordering a non-navigable stream in New Jersey and destroying a fish basket in the waters diverted therefrom placed for the catching of fish contrary to a statute. The court held the statute to be a justification. The case of Williams *v.* Blackwall (2 Hurlst. & Colt., 33) arose under an act of Parliament which authorized the summary destruction by fish wardens of what was known as salmon engines, being fish nets set in violation of the act. The case is not an authority upon the power of one legislature under the limitations of the State constitution, but the legislation upon which the action was founded shows that in a country governed by the principles of Magna Charta such legislation is not deemed inconsistent with the funda-
74 mental doctrines of civil liberty. It is insisted that the provision in the act of 1883 authorizes the destruction of nets found on the land, on shores or islands adjacent to waters where taking of fish by nets is prohibited, and that this part of the statute is in any view unconstitutional. Upon this premise it is insisted

that the whole section must fall, as the statute, if unconsitutional as to one provision, is unconstitutional as a whole. This is not, we think, the general rule of law where provisions of a statute are separable one of which only is void. On the contrary, the general rule requires the court to sustain the valid provisions, while rejecting the others. Where the void matter is so blended with the good that they cannot be separated, or where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court if compelled to defeat the main purpose of the statute will not strive to save any part. See Fisher *v.* McGirr, *supra*.

The order granting a new trial should be affirmed and judgment absolute ordered for the defendant, on the stipulation with costs.

All concur except O'Brien, J., not sitting.

A copy. H. E. SICKELS, *Reporter*.
Per C.

75 [Endorsed:] Return to E. R. Brown, Watertown, N. Y. Lawton *vs.* Steele. Opinion: Andrews, J. 4.10.

(Here follows diagram marked page 76.)

[Endorsed:] Geo. W. Lawton & Frank C. Mullin, pl'ffs in error, *vs.* William N. Steele, def't in error. Clerk's return to writ of error. E. C. Emerson, att'y for pl'ff in error, Watertown, N. Y.

Endorsed on cover: Case No. 14,184. New York supreme court. No. 203. George W. Lawton and Frank C. Mullin, plaintiffs in error, *vs.* William N. Steele. Filed September 29, 1890.

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In Supreme Court

OF THE UNITED STATES

GEORGE W. LAWTON and another, *Plaintiffs in Error*,
vs.
WILLIAM N. STEELE,
Defendant in Error.

Brief for Plaintiffs in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK, TO REVIEW A JUDGMENT OF THAT COURT, ENTERED UPON THE DECISION AND REMITTAR OF THE COURT OF APPEALS, AFFIRMING A JUDGMENT OF THE GENERAL TERM OF THE SUPREME COURT OF THAT STATE WHICH REVERSED A JUDGMENT IN FAVOR OF PLAINTIFFS IN ERROR AND AGAINST DEFENDANT IN ERROR FOR $216 DAMAGES AND $166.09 COSTS.

STATEMENT OF FACTS.

This action was brought in trover by George W. Lawton and Frank C. Mullin, an infant, by his guardian *ad litem*, in the Supreme Court of the State of New York, to recover of defendants the value of a quantity of fishing nets belonging to plaintiffs in error which defendant in error had

seized and destroyed. The defendant in error attempted to justify the seizure and destruction as a State Game and Fish Protector, under (Chap. 141, Laws of the State of New York of 1886) and Chap. 591, Laws the State of New York of 1880, as amend ed by Chap. 317, Laws of the State of New York of 1883. The defendant in error, claiming to act under the above statutes, had seized and destroyed a large quantity of fishing nets, and this action was designed to be a test case for the purpose of determining the validity and constitutionality of said statutes.

The pleadings will be found at Fols. 21-25. There is no dispute about the facts of the case.

The proofs showed that the plaintiffs were on the 5th day of May, 1887, the owners of sixteen hoop or fyke nets, twelve of which were set in Black River Bay, a part of Lake Ontario, and four were upon the shore, and that on that day the defendant removed the nets from the water, loaded them on a wagon, drew them away and afterwards destroyed them. (Fols 27-29, 31.)

The statutes under which the defendant in error attempted to justify such seizure and destruction are as follows:

By Chapter 591, Laws of New York of 1880, as amended by Chapter 317, Laws of New York of 1883, entitled, "An act for the appoinment of game and fish protectors," amendatory act passed April 26, 1883, it was enacted as follows:

> "§ 1. The Governor is hereby authorized upon the passage of this act to appoint eight, and he may in his discretion increase the number of said appointments to sixteen persons to

be known as Game and Fish protectors, whose duty it shall be to enforce the statutes for the preservation of moose, wild deers, birds and fish or any other game laws, and to bring or caused to be brought actions and proceedings in the name of the people of the State to recover any penalities or amounts or to punish any parties for the violation of said statutes or laws. Such action may be brought in the name of the people in the l ke cases in the same courts and under the same circumstances as they might now or may hereafter be brought by any individual under or by virtue of any existing or hereafter enacted statutes for the protection of deer, game, fish or any of them. Such protectors and their successors, who shall be appointed by the Governor shall hold office for three years from the date of their appointment. All vacancies shall be filled by the Governor. The District Attorney of any county of this State shall upon the request of any one of such protectors commence and prosecute to termination in the name of the people, actions and proceedings against any person reported to him by such protector to have violated any such statute or laws for the recovery of the penalty for violation thereof or for the punishment of the persons violating the same, witnesses and other fees and disbursements and full costs shall be included in any judgment in favor of the people at the rates fixed by § 3251 of the Code of Procedure without reference to the amount of recovery, *all money necessary for witnesses' fees and disbursements in any such action shall*

on the requisition of the District Attorney be advanced by, and all moneys, except costs, which shall belong to the District Attorney, recovered in any action and all fines collected shall be paid to the treasurer of the county in which action or proceedings shall have been commenced, and the District Attorney or Treasurer of such county, upon the payment of any judgment, may satisfy the same of record as the attorney for the People.

One-half of all moneys thus paid into any county treasury over and above the amount necessary to reimburse the county for any outlays or expenses paid out by the County Treasurer under this act shall be paid on or before the 30th day of September in each year into the State treasury and become and be part of the general fund. *And the remaining one-half of all such moneys over and above the amount necessary to reimburse the county for any outlays or expenses paid out by the County Treasurer under this act shall be paid to and belong to the game and fish protectors who bring or cause to be brought the action or proceeding in which such fine or penalty shall be recovered, and shall be paid to him by the County Treasurer within thirty days after the same shall be received by him from the District Attorney, upon the certificate of the District Attorney that such action or proceeding was brought or caused to be brought by such game and fish protector.*

§ 2. *Any net found or other means or device*

for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found or maintained, in or upon any of the waters of this State or upon the shores of or islands in any waters of this State in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be and is a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid, and of every game constable to seize and remove and forthwith destroy the same, and the expense of any seizure, removal and destruction of such net found, or other means or device, as aforesaid, shall be a county charge against the county in which the same shall have been so seized, and shall be paid as other county charges are paid, on the certificate, which shall be final, of such protector, which certificate shall state the time and place of such seizure and destruction the names of the persons employed therein, the time spent thereabout, and the money advanced, if any, and to whom, and shall be verified by the oath of such protector or persons, as aforesaid, making such seizure and destruction, *and no action for damages shall lie or be maintained against any person for or on account of any such seizure or destruction.*

§ 3. It shall be the duty of each of the several game and fish protectors appointed, or who may be appointed under this act, to file in the office of the State Comptroller during the month of December in each year, an account

stating the days and parts of days spent in the discharge of his duty as such protector, the kind of service rendered on such days or parts of days, and the place or places where rendered and the expenses paid or incurred in the time of the discharge of such duties, which statement shall be verified by the oath of such protectors, stating that the same is correct and true in every particular.

§ 4. For the purpose of the more effectual enforcement of the provisions of this act the game and fish protector shall be subject to the supervision and direction of the commission of fisheries who shall divide the territory of the state into protection districts and shall assign to each protector his district and shall have authority also to assign for temporary duty in any district a protector from any other district.

The said commissioners shall require of each protector at the close of each calendar month a report in writing, and in detail stating the service performed by each protector during the last preceding month, including an account of the suits commenced at his instance, the disposition made of such suits, the result of any brought to trial, and the condition of any undisposed of. And no payment for services performed or traveling expenses paid by any protector shall be made until the claimant shall present to the comptroller in addition to the usual oath of performance and payment a certificate from the said commissioners that he has made the report required

by this act and has in all other respects faithfully performed his official duty.

The commissioners of fisheries shall report to the Governor all cases of dereliction or neglect of duty of any protector which shall come to their knowledge, together with such evidence as they may have touching the case and the Governor shall have authority to remove from office any protector so reported to be delinquent after giving him an opportunity to be heard in his defense.

§ 5. This act shall take effect immediately.

And by Chapter 141, Laws of New York of 1886, entitled "An Act to prevent taking fish from the waters of Lake Ontario adjacent to the shore of Jefferson County, or from the inland waters of said County by other means than angling," passed April 15, 1886, it was enacted as follows:

§ 1. No person shall at any time kill or take from the waters of Henderson Bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar Point and the boundary line between the Counties of Jefferson and Oswego, or within one mile from the shore of any island in Lake Ontario which is a part of Jefferson County except Grenadier Island and Fox Island, or from the waters of any creek, lake or river or inland waters in the County of Jefferson, any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand. But this section shall not apply to or prohibit

the catching of minnows for bait, provided the persons using nets for that purpose shall not set them and shall throw back any bass, trout or other game fish taken, and shall keep only chubs, dace, suckers or shiners.

§ 2. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and liable to a penalty of $50 for each offense.

§ 3. All penalties imposed by this act may be recovered with costs of suit before any Justice of the Peace or in any court of record in Jefferson County. The District Attorney of said County is hereby required to prosecute actions in the name of the people of the State for the recovery of the penalty hereby imposed immediately upon receiving proper information of the incurring of a liability to pay said penalty. Any penalty so recovered in a court of record or before a Justice of the Peace shall be paid as follows: One-half thereof to the person informing the District Attorney, and one-half to the Superintendent of the Poor of said County for the benefit of the County poor. All costs or charges incurred in any such prosecutions shall be a County charge.

§ 4. This act shall take effect immediately.

The questions raised by the plaintiff and his contention on the trial as will more fully appear in the assignments of errors and brief following this statement were among others as follows:

1. That Chap 591, Laws of 1880, as amended by Chap. 317, Laws of 1883, under which defendant justified the seizure in so far as it declared said nets to be a nuisance and authorized the summary seizure and destruction of the same, was unconstutional and void as depriving the citizen of his property without due process of law.

2. That Chap. 141, Laws of 1886, prohibiting the catching of fish with nets in certain waters of Lake Ontario, was unconstitutional and void, as being in restraint of the liberty of a citizen.

3. That said Chap. 141, Laws of 1886, was also unconstitutional as being an interferance with the admiralty and maratime jurisdiction of the judicial power of the United States.

4. That the waters of Black River Bay, where the nets in question were set, were not included in or covered by the statute last mentioned.

The first of the above propositions the Trial Court ruled in plaintiff's favor, and the others against them.

And there being no controverted question of fact, directed a verdict for the plaintiffs for the sum of $216, which was conceded to be the value of the nets destroyed (fol 37). A very elaborate opinion was written by the Trial Court, which will be found at folios 39-53.

Judgment was accordingly entered against defendant and in favor of plaintiff for $216 damages and $166.09 costs, May 25, 1888. (Fol. 38.)

The defendant thereupon appealed to the General Term of the Supreme Court, where said judgment was reversed and a new trial ordered, the Court holding that both Statutes were constitutional and valid. A memorandum of an opinion was filed, which will be found at folio 57.

The General Term, however, permitted an appeal by plaintiffs to the Court of Appeals on the ground that a question of law was involved, which ought to be reviewed by that Court. (Fol. 56.)

The Court of Appeals sustained the constitutionality of both statutes and affirmed the judgment of the General Term of the Supreme Court and ordered final judgment to be entered against the plaintiffs, dismissing their complaint with costs. (Fol. 11.)

Such final judgment was accordingly entered upon the Remittitur of the Court of Appeals by the Supreme Court, on the 5th day of March, 1890, dismissing the plaintiff's complaint and for $377.36 costs. (Fols. 58, 59.)

The opinion of the Court of Appeals will be found at folios 61–75, and the case is also reported in 119 N. Y., Repts. 226.

The Court of Appeals while upholding the constitutionality of the above statutes admitted that it was a matter of some doubt and that the case was on the border line. (Fol. 72.)

From the judgment entered upon the decision of the Court of Appeals, as aforesaid, the plaintiffs bring error to this Court, and praying a reversal of said judgment for that purpose, make the following

ASSIGNMENT OF ERROR.

1. For a first assignment of error the plaintiffs

in error insist that said Chapter 591, Laws of the State of New York of 1880, as amended by Chapter 317, Laws of the State of New York of 1883, in so far as the same provides and declares nets for the taking or capturing of fish set in any waters of said State in violation of any Statute for the protection of fish to be public nuisances, is repugnant to section first of the Fourteenth Amendment to the Constitution of the United States, in that the same deprives persons of their property without due process of law.

2. For a second assignment of error the plaintiffs in error insist that said Chapter 591, Laws of the State of New York of 1880, as amended by Chapter 317, Laws of the State of New York of 1883, in so far as the same provides and declares that nets for the taking and capturing of fish, set in any of the waters of said State in violation of any Statute for the protection of fish, may be abated and summarily destroyed by any person, and makes it the duty of every game and fish protector and game constable to seize, remove and forthwith destroy the same, is repugnant to section first of the Fourteenth Amendment to the Constitution of the United States, in that the same deprives persons of their property without due process of law.

3. For a third assignment of error, the plaintiffs in error insist the said Chapter 591, Laws of the State of New York of 1880, as amended by Chapter 317, Laws of the State of New York of 1883, in so far as the same provides and declares nets for taking or capturing fish,

found or maintained upon the shores of or islands in any waters of said State in violation of any Statute for the protection of fish, to be public nuisances, is repugnant to section first of the Fourteenth Amendment to the Constitution of the United States, in that the same deprives persons of their property without due process of law.

4. For a fourth assignment of error, the plaintiffs in error insist that said Chapter 591, Laws of the State of New York of 1880, as amended by Chapter 317, Laws of the State of New York of 1883, in so far as the same provides and declares, that nets for taking or capturing fish found or maintained upon the shores of or islands in any waters of said State in violation of statutes for the protection of fish, may be abated and summarily destroyed by any person, and makes it the duty of every game and fish protector and game constable to seize, remove and forthwith destroy the same, is repugnant to Section first, of the fourteenth amendment to the Constitution of the United States, in that the same deprives persons of their property without due process of law.

5. For a fifth assignment of error, the plaintiffs in error insist that said Chapter 591, Laws of the State of New York of 1880, as amended by Chapter 317, Laws of the State of New York of 1883, in so far as the same prrovides and declares that no action for damages shall lie or be maintained against any person for or on account of the seizure or destruction of any nets for taking or cap-

turing fish set in any waters of the State in violation of any statutes for the protection of fish is repugnant to Section first of the fourteenth amendment to the Constitution of the United States, in that the same deprives persons of their property without due process of law.

6. For a sixth assignment of error the plaintiffs in error insists that said Chap. 591, Laws of the State of New York of 1880, as amended by Chap. 317, Laws of the State of New York of 1883, in so far as the same provides and declares that no action for damages shall lie or be maintained against any persons for or on account of the seizure or destruction of any nets for taking or capturing fish found or maintained upon the shores or on islands in any waters of said state in violation of any statutes for the protection of fish is repugnant to Section first of the fourteenth amendment to the constitution of the United States in that the same deprives persons of their property without due process of law.

7 For a seventh assignment of error the plaintiffs in error insists that Chap. 141, of the Laws of the State of New York of 1886, in so far as the same prohibits the taking of fish from the waters of Lake Ontario in any other way than by hook or line or rod held in hand is repugnant to Section first of the fourteenth amendment to the constitution of the United States in that the same deprives persons of their liberty without due process of law.

8. For an eighth assignment of error the plaintiffs in error that said Chap. 141, Laws of the State

of New York, of 1886, in so far as it prohibits the taking of fish from the waters of Lake Ontario in any other way than by hook and line or rod held in hand and declares a violation of such statute to be a misdemeanor and pronounces penalties for the same to be enforced in the Courts of the State of New York is repugnant to § 2, article 3, of the constitution of the United States, in that the same is an interference with the admiralty and maritime jurisdiction of the judicial power of the United States, and an attempt to confer such jurisdiction upon the State Courts.

9. For a ninth assignment of error the plaintiffs in error also insist that the provisions of § 2, Chapter 591, Laws of the State of New York, of 1880, as amended by Chapter 317, Laws of the State of New York, of 1883, is repugnant to the fifth amendment to the constitution of the United States, in that the same deprives persons of their property without the due process of law.

10. For a tenth assignment of error the plaintiffs in error also insist that the provisions of Chap. 141, Laws of the State of New York of 1886, are also repugnant to the Fifth Amendment to the Constitution of the United States in that the same deprives persons of their liberty without due process of law.

The following argument is submitted for the purpose of substantiating the position of the plaintiffs in error and while attention is called to the whole of the same particular attention is invited to *point third*, which it is confidently believed fully es-

tablishes the fallacy of the position taken by the court below.

BRIEF AND ARGUMENT.

I.

THE CASE INVOLVES A FEDERAL QUESTION AND IS PROPERLY REVIEWABLE IN THIS COURT ON WRIT OF ERROR.

The record shows that the statutes, the constitionality of which are assailed, were set up as a defense in the answer (fol. 24) that the decision of the Trial Court was placed expressly on the ground of such unconstitutionality that the General Term of the Supreme Court in rendering its decesion affirmed the constitutionality of said statutes and therefore reversed the judgment of the Trial Court and that the Court of Appeals also affirmed such constitutionality in rendering its decision (fols. 52, 25,57, 72) and besides the record of the Court of Appeals shows that the validity of said statutes and of the authority exercised under the same was drawn in question on the ground that they were repugnant to the Constitution of the United States and that the decision was in favor of their validity, (fol. 10–16.) The case is therefore brought within the Judiciary act and is properly reviewable on writ of error.

Judiciary Act of 1789, § 25.
United States, R. S. § 709.
Cohens vs. Virginia, 6 Wheat., 264.
Murray vs. Charleston, 96 U. S., 432.
Miller vs. Nichols, 4 Wheat., 310.
French vs. Hopkins, 124 U. S., 524.
Railroad Co. vs. Roch, 4 Wall., 177.
Martin vs. Hunter, 1 Wheat., 304.

Medbury vs. Ohio, 24 How., 413.
Chicago Life Insurance Co. vs. Needles, 113 U. S. 574.
Crowell vs. Randall, 10 Peters, 368.
Ryan vs. Thomas, 4 Wall., 603.
Simmerman vs. Nebraska, 116 U. S. 54.

The amount involved is of no consequence so far as a review of the case is concerned.

Buel vs. Van Ness, 8 Wheat., 312.
Pratt vs. Fitzhugh, 1 Black., 271, 273.

And the wait of error was properly addressed to the Supreme Court, as the Court of appeals remmitted the record to that Court.

Atherton vs. Fowler, 91 U. S., 143.
McGuire vs. Com., 3 Wall, 382.
Gelston vs. Hoyt, 3 Wheat., 246.

II.

THE LEGISLATURE OF THE STATE OF NEW YORK HAD NO POWER UNDER THE CONSTITUTION TO DECLARE THE NETS IN QUESTION TO BE PUBLIC NUISANCES.

1. The only ground on which this legislation is sought to be upheld is the so-called police

power of the Legislature. It is undoubtedly true that this power is very broad and far-reaching, and that the tenure of property is held subject to its exercise, it rests upon the fundamental principle that every one shall so use his own property as not to wrong or injure others, and that one of its ordinary functions is to regulate and abate nuisances.

Fertilizing Co. vs. Hyde Park, 97 U. S., 660, per Swaym, J., at page 667.
Munn vs. Ills., 94 U. S., 124, 125.
Slaughter House Cash, 16 Wall, 62.
2 Kent Com., 340.
Matter of Cheesebrough 78 N. Y., 233, 237.

But this police power is not above the Constitution. It can only be exercised when necessary for the health, comfort, safety and welfare of society.

Cooley Const. Limitations, 577.
Railroad Co. vs. Huson, 95 U. S., 465. Per Strong, J., page 470 and 471.
Patterson vs. Kentucky, 97 U. S., 501. Per Harding, J., at page 504.
Matter of Jacobs, 98 N. Y., 98, 108.

And a mere legislative declaration cannot make a thing a nuisance unless it in fact has that character.

Yates vs. Milwaukee, 10 Wall, 498, 505.

In Coe vs. Schultz, 47 Barb., 64, Judge Sutherland says: "I am not willing to concede that the legislature can constitutionally declare an act or thing to be a common nuisance which palpably, according to our present experience or information, is not and cannot be under any circumstances a common nuisance

by the common law definitions or common law decisions. I am not willing to conclude that the legislature can constitutionally declare or authorize any sanitary commission or board to declare the keeping or the use in any way of sugar or vinegar to be a common nuisance because the one is sweet and the other sour, or for any other reason. By such an unlimited power, it is easy to see that any citizen might be deprived of his property without compensation and without any conceivable pretext that the public good required such deprivation."

In Village of Des Plaines, vs. Poyer, 123 Ill., 348, where the plaintiff was authorized by its charter to declare what should be a a public nuisance, it was held by the Supreme Court of Illinois, that such power did not authorize it to declare that to be a nuisance which in its natute was not such, and that therefore an ordinance declaring public picnics and dances to be nuisances was void. The nuisance would result not from such gatherings themselves but from the manner of conducting them, and the ordinance should have been directed against that alone.

See also to same effect People vs. Board of Health, 140 N. Y., 1.

In Brown vs. Perkins, 12 Gray, 89, it was held that intoxicating liquors kept for sale were not a nuisance, notwithstanding the the statute declared them to be such, and that their summary destruction was unlawful. The opinion was delivered by the late Chief Justice Shaw, and particular attention is

invited to this case as it is believed to be well in point.

2. It will be observed in this connection that under the Statutes (Laws of N. Y., 1880, Chap. 591, as amended by Laws of N. Y. of 1883, Chap. 317), it is not the *fishing* which is declared to be a nuisance, but *the nets* alone.

A common nuisance is defined to be a public annoyance.

3 Bl. Com., 216.
Coe vs. Schultz, 47 Barb, 67.
Wood on Nuisances, § 1.

It is anything that worketh hurt, inconvenience or damage.

3 Bl. Com., 216.
2 Broom & Hadley's Com. (Wait's Ed.), 219.
4 Wait's A. & D., 729.

And under the New York statutes it is defined to be any act which annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons, or offends public decency.

Penal Code, § 380.

Within the above definitions, a fishing net is not and cannot be a public nuisance. Fishing is not a public annoyance, and in no sense is it a hindrance to the public repose, health, comfort or safety. But if it was, the result would be the same. If the prevention of fishing is a matter that properly comes within the police power, and may be properly said to be so connected with the health, safety, comfort and welfare of society as to warrant

the exercise of that power, then we submit that it would be *the act of fishing, not the nets*, that would constitute the nuisance.

The nets in and of themselves are entirely harmless. They are no more a nuisance than than the boat used to set them in the water, or the wagon used to draw the fish to market. The nuisance would result not from the nets themselves, but from their *illegal use.*

3. It is therefore submitted that the Legislature cannot in the exercise of the police power declare that to be a nuisance and authorize its summary destruction as such, which obviously is not and can not from its nature be a nuisance and when it declared fishing not to be a public nuisance it exceeded its power under the Constitution.

In declaring such nuisances and proving for their abatement by the destruction of the property it deprived the owners of their property without due process of law within the meaning of Section 1 of the fourteenth Amendment to the Constitution of the United States.

III.

CHAPTER 591, LAWS OF NEW YORK, of 1880, AS AMENDED BY CHAPTER 317, LAWS OF NEW YORK, OF 1883, SO FAR AS IT PROVIDES FOR THE SUMMARY SEIZURE AND DESTRUCTION OF FISHING NETS, IS UNCONSTITUTIONAL.

This statute, it will be observed, not only declares fishing nets under certain circumstances to be public nuisances, but provides that they may be summarily abated and destroyed by any person and makes it the duty of certain officers *to sieze, remove and destroy* the same, and further provides that no action for damages shall lie on account of such seizure or destruction.

Assuming for the purposes of the case that there was power under the constitution to declare the nets public nuisances, it is submitted that this most extraordinary legislation was not a proper or valid exercise of legislative power.

1. It is provided by the constitution of the United States that no state shall deprive any person of his property without due process of law. (Const., U. S., 14th amendment, § 1; see also 5th amendment.)

The term "due process of law," means a judicial trial, or an investigation, in which a citizen has the right and opportunity to be heard and to defend, enforce and protect his rights.

Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation. Dist. No. 108, 111 U. S., 701, 711.
McMillan vs. Anderson, 95 U. S., 37.
Pennoyer vs. Webb, 95 U. S., 714.
Kennard vs. Louisiana, 92 U. S., 481.

Stuart vs. Palmer, 74 N. Y., 184, 191.
Kentucky Rail Road Tax cases, 115 U. S., 321.
Palmer vs. McMahon, 133 U. S., 661.
Matter of McPherson, 104 N. Y., 306, 321.
People vs. Supervisors, 70 N. Y., 229.
Rockwell vs. Nearing, 35 N. Y., 302.

The above statute not only ignores the constitutional provision cited, by authorizing the summary seizure and destruction of property without the semblance of a notice, hearing or investigation, but it specially prohibits such investigation by declaring that *no action for that purpose should lie or be maintained.* It would seem to be a plain infraction of the constitution.

In Bradstreet vs. Neptune Ins. Co., 3 Sumner, 601, it is said by Storey, J., at page 607: "It is a rule founded on the first principles of natural justice that a party shall have an opportunity to be heard in his defense before his property is condemned." And again in McVeigh vs U. S., 11 Wall., 259, 267, Swayne, J., says the right of an opportunity to appear and be heard before condemnation of property, is too sacred to be denied even to an alien enemy.

In Windsor vs. McVeigh, 3 Otto, 274, 279, Field, J., says: "The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner or parties interested to appear and be heard upon the charge.

2. The authority to abate nuisances is, as we have seen, an exercise of the police power.

Fertilizing Co. vs. Hyde Park, 97 U. S., 660. Per Swayne, J., at page 667.
Matter of Cheesebrough, 78 N. Y., 233, 237.

The exercise of the police power is subordinate to the constitution and must give way to the same.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650, 661, 662.
Walling vs. Michigan, 116 U. S., 446.
Mugler vs. Kansas, 123 U. S., 623. Per Harlan, J., at page 663.

The exercise of the police power arises from necessity and cannot be carried beyond the scope of that necessity and under color of such power objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.

Railroad Co. vs. Husen, 95 U. S., 465. Per Strong, J., at page 473, 474.
Chy Lung vs. Freeman, 92 U. S., 276, 280
People vs. Gillison, 109, N. Y., 389, 400.
Matter of Cheesebrough, 78 N. Y., 233, 237-238.

The right of an individual to abate a nuisance is not the creation of positive law but is a natural right, having the same origin, extent and limitations as the right of self-defense and is commensurate with the necessities of the case. This right cannot be extended by legislation, and any statute which assumes to do so subordinates the property rights of a citizen to the will of individuals and substitutes a government of force for that of the law. Such an enactment is violative of the constitution.

Russel vs. Mayor, 2 Denio, 461, 473, 474.
Wynehamer vs. People, 13 N. Y., 378.

Per Comstock, J., pages 401, 402. Selden, J., 439. Brown vs. Perkins, 12 Gray, 89; per Shaw, Ch. J. page 101.

This right is one of the few exceptions that exists to the rule that a man cannot take the law into his own hands.

Welch vs. Stowell, 2 Doug., (Mich.) 332, 341.

When the necessity for its exercise passes away the constitutional rights of the individual attach. It therefore follows that the powers of the legislature are limited and circumscribed in this respect the same as the individual, and that it cannot constitutionally authorize the destruction of property as a public nuisance unless such right of destruction existed at the common law.

3. The rule is elementary that the right of abatement is the creature of necessity and can only be exercised to the extent necessary to remove the injury, and when this end is reached all further right of interference ceases.

3 Bl. Com., 5, 6 and note.
Wood on Nuisances, (2d Ed.) §§ 33, 738.

A man has no right to abate any more of a nuisance than is necessary to secure his rights, for when that is done it ceases to be a nuisance as to him.

Cooper vs. Marshall, 1 Burr, 260.

In Rex vs. Pappineau, 2 Strainge, 688, it is said: "If my neighbor builds his house too high, by which my ancient lights are stopped,

I shall not take down the whole house but only so much as makes it too high."

See also Trahearn's Case, Godbolt's Rep., (321), 233.
Cooper vs. Marshall, 1 Burr., 259, 267.

And in 2 Salk, 458: "The abatement by the individual must be limited by necessity and no wanton or unnecessary injury must be committed.

See also Dimes vs. Petley, 15 Queen's Bench, (N. S.) 276, 283.

In the abatement of nuisances as little damage must be done as possible, and under no circumstances are the materials to be destroyed or converted.

Wood on Nuisances, (3rd Ed.) § § 33, 741.
Larson vs. Furlong, 50 Wis., 681.
Brown vs Perkins, 12 Gray, 89, per Shaw, Ch. J., pages 100-102.

Property cannot be destroyed in the abatement of a nuisance until its destruction is lawfully ascertained to be necessary therefor and then only so far as is determined to be necessary.

Shepard vs. People, 40 Mich., 487.

In Welsh vs. Stowell, 2 Doug., (Mich.) 332, it is said, at pages 341 and 342: "The power to abate a nuisance is limited to the removal of that in which the nuisance consists, and nothing must be done except what is absolutely necessary to abate the nuisance."

And again in Shepard vs. People, 40 Mich., 487, the same Court say: "Property cannot be destroyed until its destruction is lawfully

ascertained to be necessary to stop a nuisance and then no other and no more is to be destroyed than is needful to effect that object."

4. There was no necessity in this case for the destruction of the nets for the purpose of abating the nuisance.

The nets destroyed were harmless of themselves, and were not and could not be nuisances. The nuisance, if at all, resulted from the *use* they were put to and not from *the nature of the property itself*. The rule in such cases is that the wrongful use may be stopped, but the property itself cannot be destroyed.

Wood on Nuisances, (2d Ed.) 33, §738, page 803.
Rex vs. Pappineau, 2 Strange, 688.
Chenango Bridge Co. vs. Paige, 83 N. Y., 178, 188, 189.
Welch vs. Stowell, 2 Doug., (Mich.,) 332.
1 Hilliard on Torts, 3d (Ed.) 577, § 18 *a*.

When the nuisance consists in the wrongful use of property, harmless in itself, the remedy is to stop the use, not to destroy the property.

Barclay vs. Com.: 25 Penn. St., 505, 505.

In Ely vs. Supervisors, &c., 36 N. Y., 297, the owner of a house brought an action against the board of supervisors of Erie county, under the statute, to recover for its destruction by a mob. The defense was that it was a house of ill fame, and a resort for thieves, robbers and murderers, and that being such it was a common nuisance, and could be law-

fully destroyed. It was held that the nuisance resulted from the use the property was put to and not from the nature of the property itself. That the remedy was not to destroy the property, but to abate the use, and that therefore such destruction was unlawful and defendant liable.

In Babcock vs. City of Buffalo, 56 N. Y., 268, it was held that an abatement of a nuisance must be limited by necessity and no wanton or unnecessary damage done, and that when a canal was a nuisance on account of deposits therein, which could be abated by cleaning the same, the city had no right to fill up the canal for that purpose.

In Brown vs Perkins, 12 Gray, 89, a statute of Mass. declared all intoxicating liquors kept for sale to be a common nuisance, and that they were to be regarded and treated as such. The Supreme Court held that the nuisance resulted *from the act of keeping* and not from *the liquors themselves*, and therefore there was no right to abate the nuisance by destroying the liquors.

See Opinion of Shaw, Ch. J., pages 100–102.

A private person has in no case a right to destroy or convert the materials of which a nuisance is composed.

Wood on Nuisances, (2d Ed.,) § 741.
Larson vs. Furlong, 50 Wis., 681.

In this case the nuisance was abated by the removal of the nets from the water and then all right of interference ceased.

The property could not be destroyed to prevent future fishing as there would clearly be no right to *anticipate* a violation of the statute in the future and to confiscate the property for that reason. Nor could the property be destroyed as a *penalty* for in that case the owner would be entitled to such notice or such judicial proceedings must be had as would constitute due process of law.

Taylor vs. Porter, 4 Hill (N. Y.), 140.
Rockwell vs. Nearing, 35 N. Y., 302.
Carapbell vs. Evans, 45 N. Y., 356, 358.

This was also conceded to be the correct rule of law by the Court of Appeals in the present case. (119 N. Y., 239.) See also folios 71–72

There was no difficulty in this case in removing the nets from the water and after their removal the public were just as well protected by their detention until a judicial determination and confiscation could be had if necessary, as by their immediate destruction. As well might the boat of the fisherman be destroyed as his net for one is used in the fishing just as much as the other.

5. The validity of this statue cannot be upheld on the theory that as it condemns the act, a person who does such an act forfeits his property rights. This argument begs the whole question. Before property rights can be forfeited for a violation of the law, the owner must have such an opportunity to defend, enforce and protect his rights as constitutes due process of law. In other words

it must in some manner be *judically determined or established* that he has violated the law, or has incurred the forfeiture in question.

Rockwell vs. Nearing, 35 N. Y., 302.

As is said by Allen J., in Campbell vs. Evans, 45 N. Y., 358, "Property cannot be confiscated by act of the legislature, or taken from the rightful owner without a forensic trial and judgment, a trial by the ordinary modes of judicial proceedings."

The statute in this regard simply declares a legislative confiscation, without notice or judicial condemnation. Nothing is plainer, than that this is an excessive use of legislative power.

See also Bradstreet vs Neptune Ins. Co., 3 Summr, 601, Story J., page 607.
McVeigh vs. U. S., 11 Wall., 259, 267.
Windsor vs. McVeigh, 3 Otto., 274, 279.

6. The Court of Appeals, however, while conceding the correctness of the above rules of law that the abatement of a nuisance must be limited to the necessities of the occasion, and that the property could not be destroyed by way of punishment or forfeiture, sustained the law and the acts of defendant in error under it as being a reasonable means of abating the nuisance.

Fol. 72, see also 119 N. Y., 239, 240.

The rule thus laid down is manifestly erroneous. The destruction of the nets was not a necessary incident to their removal.

from the water. It is a matter of common experience and observation that fishing nets are set, taken up and reset again every day during the fishing season. In fact every time they are overhauled for fish they are taken from the water. There was not, and from the nature of the case could not, be any trouble in their removal from the water without destroying them. The nets could be used for lawful purposes as such use was not prohibited on the opposite side of Pillar Point or in any waters north of the westerly end of that point. This being so there was no right of destruction, as the abatement of a nuisance must be limited by necessity and no wanton or unnecessary injury must be done

3 Black Com., 6.
Wood on Nuisances, (2d Ed.) §§ 33, 738.
2 Salk., 458.

The Court of Appeals, while admitting this to be the correct rule of law, and that the nets could be removed without destroying them places its decision upon the ground that being of small value th legislature might order their destruction.

The suggestion is unworthy the learned court from which it eminates.

To say that property, because of its small value, is therefore to be outlawed and placed beyond the pale of constitutional protection, is to advance a doctrine unheard of before and fraught with the greatest dangers to our liberties. The apparatus of the poor fisherman, in many cases covering every dollar he

owns in the world, is just as valuable to him as the millions of the rich and is guarded and protected just as sedulously by the conconstitution. Moreover, the proofs did not show any such state of facts as would justify the destruction of the property within the rule laid down by the Court of Appeals.

The evidence shows that the nets were not detsroyed in the process of removal from the water, but that after they had been taken from the water, and the nuisance thereby abated, the defendant in error loaded them in a wagon, drew them away and afterwards destroyed them (fol. 31, page 15). Thus the case was presented where property which had ceased to be a nuisance, was harmless of itself and could lawfully be used for fishing purposes in all other waters outside the small area specified in Chap. 141, Laws of 1886, was arbitrarily taken and destroyed pursuant to the command of the statute, without the semblance of notice or judicial proceedings, or any necessity for such destruction.

The statute, it will be observed notwithstanding, contemplates the destruction of the property after it has been removed from the water. It declares it to be the duty of game and fish protectors *to seize, remove and forthwith destroy the nets.* It is only by upholding this statute to the fullest extent that the acts of defendant in error can be justified, and this is what the Court of Appeals has done by its decision.

As the property was harmless of itself and capable of a lawful use, and as the nuisance

had already been effectually abated by the removal of the nets from the water, it is submitted that their destruction was unlawful and the statute, so far as it authorized the same, is unconstitutional and void, and the authority exercised by defendant in error under the same fails of justification.

7. An examination of the authorities will show that similar legislation has been condemned and held unconstitutional by the highest courts in several other states.

In the case of Leck vs. Anderson, 57 Cal., 251 S. C., 40 Amer Rep., 115, the Supreme Court of California, held that a statute which declared fishing with nets to be a misdemeanor and that all nets used in such illegal fishing should be forfeited, and further authorized peace officers to seize and destroy the same without any judicial hearing, was unconstitutional.

In that case the Court said: "The statute under consideration contained no provisions whatever for determining whether the property was liable to condemnation for the forfeiture demanded against it, for the criminal acts of those who had it in charge. It merely authorized the peace officers to seize the property without warrant to condemn it, without proof or the observance of judicial form, and to destroy it without notice of any kind.

Such an enactment cannot be harmonized with those constitutional guaranties, which are supposed to secure every one within the state in his right of liberty and property."

In Lowry vs. Rainwater, 70 Mo., 152 S. C., 35 Amer. R., 420, the Supreme Court of Missouri held that a statute which authorized the police to seize and destroy prohibited gambling implements without notice or judicial investigation, was unconstitutional.

The Court say: "A legislative act which authorizes an officer, without notice to the owner, or even the semblance of a judicial investigation, to seize and destroy the property of a citizen cannot be sustained under a constitution which declares that no state shall deprive any person of life, liberty or property without due process of law."

In Fisher vs. McGirr, 1 Gray, 1, the Supreme Court of Mass. held that a statute which made the possession of intoxicating liquors kept for sale unlawful and provided for their seizure and destruction without a judicial hearing or condemnation, and also provided that no action should lie therefor, was unconstitutional.

See opinion Shaw, Ch. J., pages 27, 28, 32–41, 46–48,
See also to same effect Brown vs. Perkins, 12 Gray 89.

A law prohibiting the sale of intoxicating liquors and authorizing their seizure which does not provide for notice to the owner nor for any trial of the question, is unconstitutional.

Green vs. James, 2 Curtis, C. C., 187.
Hibbard vs. People, 4 Mich., 125.
Craig vs. Northmeller, 78 Iowa. 599 pages 603 and 604.

In Darst vs. People, 51, Ill., 286, the Supreme Court of that State held an ordinance which declared intoxicating liquor kept for sale to be a nuisance and authorized its removal without notice to the owner, to be invalid. The Court say: "A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation cannot be left to peace officers or constables to determine."

In Dunn vs. Burleigh, 62 Maine, 24, a statute authorizing the land agent to seize teams, implements, apparatus and supplies used in trespassing upon public lands and to sell the same at public auction by giving notice of the time and place of sale for at least two weeks by publication in a newspaper in the county where the trespass was committed, and the proceeds after deducting expenses to be paid into the State treasury, was held to be unconstitutional.

The Court say at pages 36-37: The Constitution of the United States declares that no State shall deprive any person of life, liberty or property without due process of law. While it may not be safe to determine in advance what in every case will be deemed due process of law, we feel no hesitation in saying that in a case like this, where the State undertakes to confiscate a person's property upon the ground that it has been used in committing a trespass upon the public lands, something more is necessary than an *ex parte* determination and command of the land agent. It will be noticed the same protection is se-

cured to property as to life and liberty. Will any one contend that it is competent for the Legislature to pass an act authorizing the land agent to seize the person of a trespasser upon the public lands, and hang or imprison him for life without any other trial of his guilt than the *ex parte* determination of the land agent himself and no other authority than his own personal command? Of course not. No more is it competent for the Legislature to pass an act authorizing the land agent to deprive a person of his property in such a summary mode, for what is due process in one case must be equally so in the other."

And again in the case of King vs. Hayes, 80 Maine, 206, the same Supreme Judicial Court held that a statute which authorized an officer or agent of a society for the prevention of cruelty to animals to fix the value of and to condemn and kill a horse without notice to the owner, was unconstitutional, as taking property without due process of law.

Again in Gray vs. Kimball, 42 Maine, 297, the Court say at page 307: "Certain articles which are treated as property, while used for a lawful purpose, may be subjects of forfeiture and destruction under proper statutory provisions, if their use becomes pernicious to the best interests of the community. The exercise of this power must be properly guarded that abuses may be prevented and that a citizen shall not be deprived of his property without having an accusation against him setting forth the nature and charge thereof,

and but by the judgment of his peers or the law of the land.

In Varden vs. Mount, 78 Ky., 86, S. C., 39 Amer. Rep., 208, it was held by the Court of Appeals of Kentucky, that an ordinance, passed by legislative authority, authorizing a town marshall to seize and sell stray hogs, without notice to the owner, was unconstitutional. The Court say in this case: "The right in this instance should not be extended beyond impounding the hogs. When that was done the necessity for summary and precipitate action ceased and judicial proceedings looking to their forfeiture, may then properly begin.

In the case of State vs. Robbins, 124 Ind., 309, it was held by the Supreme Court of that State that a statute which provided that gambling implements kept contrary to law should be destroyed on conviction of the offender did not authorize such destruction, without the order of the Court.

The rule as to the right to destroy property on the ground that it is a public nuisance is well stated in this case. The Court say at pages 312 and 313: "It is fundamental that no person can be deprived of any article which is recognized by law as property without a judicial hearing after due notice. No degree of misconduct or wrong can justify the forfeiture of the property of a citizen, except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have the opportunity to con-

test the ground on which the forfeiture is claimed.

There are, however, some articles which cannot be kept. exhibited or used for any lawful or innocent purpose, such as spurious coin, obscene pictures, books or prints, and other articles and devices, the exhibition, use or possession of which, in any form and under all circumstances, is unlawful or corrupting and prejudicial to the public morals or health. Such articles are regarded as nuisances *per se*. Property cannot exist in them, and an officer into whose hands they come may be authorized by statute or ordinance to destroy them summarily without process.

There are other articles which are not in and of themselves nuisances which may be used for illegal or immoral purposes, and which may yet be regarded as property. *Unless, therefore, articles seized are of such a character that the law will not recognize them as property, entitled as such to its protection under any circumstances, they can not be summarily destroyed without affording the owner an opportunity to be heard upon the subject of their lawful use and to show whether or not the articles are intrinsically useful or valuable for any other purpose than gambling, or whether their only recognized value and customary use is as implements of gaming.*"

Cooley, in his work on Constitutional Limitations, states the rule as follows, at pages 562 and 363:

"Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeiture of rights and property cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law. And if the legislature cannot confiscate property or rights neither can it authorize individuals to assmue at their option powers of police which they may exercise in the condemnation and sale of property offending against their regulations or for the satisfaction of their charges and expenses in its management and control rendered or incurred without the consent of the owners."

Again in Mugler vs. Kansas, 123 U. S., 623, it was stated by Harlan, J., at p. 671 and 672, that a law which declared property to be a nuisance and authorized its seizure and destruction without judicial hearing or condemnation would be unconstitutional, and in the State of New York this class of legislation has been uniformly condemned. Thus was said in Wynehamer vs. People, 13 N. Y., 378, that a statute authorizing the destruction of property not *per se* a nuisance, because used in violation of law, without a previous judicial condemnation or prosecution of the offender is unconstitutional. Hubbard, J., says, at page 454. "It is not pretended nor can it be, that property which is not *per se* a nuisance, can be annihilated by force of a statute alone or by proceeding *in rem* for the punishment of a personal offense.

Liquor is not a nuisance *per se* nor can it be made so by a simple legislative declaration. It does not stand in the category of common nuisances, which of themselves endanger the welfare or safety of society. *It is its use and abuse as a beverage which gives it its offensive character.* Otherwise it is entirely inoffensive. In my judgment, therefore, it cannot be confiscated to prevent its misuse, except through a prosecution against the owner *in personam.*"

See also opinion, Selden, J., page 438.

In Rockwell vs. Nearing, 35 N. Y., 402, a statute which authorized the seizure and sale of property for a private tresspass was held unconstitutional.

And to same effect see Oppen vs. Holmes, 44 Ill., 362.

In Willis vs. Warren, 1 Hilt., 590, 594, it was held that a statute antagonizing the seizure and destruction of gaming apparatus would not justify such destruction until after a conviction of the offendor had been obtained.

In Salter vs. VanDerveer, 47 Hun, 366, where the plaintiff had planted oysters in violation of law, it was held that his property rights were not forfeited and their destruc- was unlawful.

And in Fischer vs. Blank, 138 N. Y., 245, it was held that where property was capable of being used for lawful purposes it could

not be destroyed because used for an improper purpose.

8. The cases cited by the counsel for defendant in error are not in point and are perfectly consistent with the views above advanced.

In Smith vs. State of Maryland, 18 How., 71-76, the legislature of Maryland passed an act prohibiting the catching of oysters with a scoop or drag, and forfeiting all boats used in such illegal fishing as a means of punishment. The act provided a method for the judicial ascertainment of the forfeiture and condemnation of the property, which obviated all constitutional objections.

And so in the case of Miller vs. Snover, 42 N. J. L., 341. In that case the legislature of New Jersey had passed an act forbidding the use of fish baskets in the catching of fish. Fish wardens were appointed, whose duty it was to give public notice in two newspapers that such contrivances were known to exist and requiring their removal, and if not removed in ten days, the statute provided that the same should be removed by such wardens and the materials forfeited to the State. The plaintiff erected a dam and diverted all the water of a stream upon his own land, upon which he constructed a fish basket, through which the water ran, and thereby caught all the fish in the stream. The case was decided by two judges only, and the question of the constitutionality of the legislation does not seem to have been considered. Upon the facts, however, it may be said:

First, that the erection of the dam and construction of the fish basket in such manner as to stop the passage of all the fish in the stream, was the plainest kind of a nuisance.

State vs. Franklin Falls Co., 6 Amer. Rep., 513.
State vs. Roberts, 47 Amer. Rep., 199.
Rothesy vs. N. Y. Rubber Co., 24 Hun., 172.
Wood on Nuisances (2d Ed.), §§ 364, 365, 366.

Second, that the notice provided by the statute was due process of law, and therefore the constitutional objection was obviated.

Campbell vs. Evans, 45 N. Y., 356, 359.

If, however, the doctrine of Miller vs. Snover should be construed as extending further than as above stated, it is plainly contrary to the adjudged cases and should not be followed.

Williams vs. Blackwell, 2 Hurlst & Colt., (Ex.) 33, arose under an act of Parliament, which authorized the destruction of fixed engines used to catch salmon It does not appear but that the engines were destroyed in their removal, but at all events no question as to the constitutionality of this statute was presented, because in England the powers of Parliament are sovereign and unlimited.

1 Black Com., 160, 161.
1 Broom & Had. Com. (Wait's Ed.), 132, 133.

The cases cited by the General Term of the Supreme Court in the memoranda of opinion do not hold any contrary doctrine to that above contended for. They are mainly Hinckley vs. Emerson, 4 Cowen, 351; Brown vs Hoberger, 52 Barb, 25; Blagins vs. Miller, 10

Hun., 435. As to the first two cases they simply involve the right to kill dogs that were worrying sheep and the last case as to the power to destroy impure and unwholesome food which was offered for sale. In either case the offending matters were plainly nuisances which could not be abated without their destruction.

Wood on Nuisances (2d Ed.) §§ 871, 747.

Argument is therefore not needed to show that the cases have no application.

In Mugler vs. Kansas, 123 U. S., 623, this Court upheld a statute which declared all places where intoxicating liquors were kept for sale nuisances, and provided for a destruction of such liquors upon a judgment for abatement.

The statute, however, provided due process of law as such destruction was not authorized until after the suit had been brought for that purpose and judgment entered by a Court having jurisdiction, declaring the place to be a nuisance, and directing the abatement and destruction of the property by the peace officers. Justice Harlon says in that case at page 672, that under the statute the Court must in some legal mode find the place to be a nuisance before judgment of condemnation can be passed.

As a result of these observations it is submitted that the statute authorizing this destruction was a clear violation of the constitutional requirements and that as the au-

thority exercised thereunder by the defendant in error fails of justification, the plaintiffs in error were entitled to recover in this action.

IV.

SAID CHAPTER 591, LAWS OF N. Y. OF 1880, AS AMENDED BY CHAP. 317, LAWS OF N. Y. OF 1883, IS IN THE RESPECTS ABOVE MENTIONED UNCONSTITUIONAL FOR ANOTHER REASON.

1. It will be seen that the destruction of nets on the shores of or on the islands in prohibited waters is also authorized and all actions for damages therefor are prohibited. Although it may have never been used, or may have been stored away for years, yet if it happens to be on the shore of any water where fishing is prohibited or any island in the same, the owner is deprived of all property rights in it, and its destruction is made lawful. No one will have the temerity to pretend that this provision of the statute is constitutional. If such a law is valid the legislature may, with impunity, confiscate the farm property of a person, or order the demolition of his farm buildings.

Nor can this provision be eliminated and

the statute upheld as to the residue. The provisions of the statute are single and indivisible and provide a single scheme for the enforcemen of the game laws. It declares to be public nuisances all nets by which fish *may* be taken or captured, whether in the water or on the shore, and whether in use or not.

It is aimed not at property *used* in violation of law, but at property which *may be so used*, and upon a trial, the Court, if the statute was valid at all, would be obliged to charge the jury that if the nets were found in the water the statute was constitutional, but if found on the shores or islands it was unconstitutional. A constitutional question can not be decided in this manner.

It is therefore apparent that the part in question cannot be eliminated without defeating the object of the statute. They are inseparably connected and the intention of the legislature was to deal with both together as a whole. Viewing its evident intent it is impossible to suppose the legislature would have passed the one without the other. In such cases the whole statute will be held void.

People vs. Kenney, 96 N. Y. 294.
Durvea vs. Mayor, 96 N. Y., 477.
State vs. Denny, 21 N. E. Rep., 274, 283.

2. Besides, it is penal legislation of the most decided character, and in such cases the rule is that the whole statute must stand or fall together.

In Wynehamer v. People, 13 N. Y., 378, the old Maine Law was held unconstitutional, on the ground that it substantially destroyed the property in intoxicating liquors owned and possessed when the act took effect. It was further held that this objectionable feature could not be eliminated and the statue upheld as to the residue. Johnson, J., says at page 425: "Laws in relation to civil rights are sometimes held to be unconstitutional in so far as they affect the rights of certain persons and valid in respect to others. This is done mainly upon the ground that the Courts will not construe them to relate to such cases as the Legislature had no power to act upon. *To statutes creating criminal offenses such a rule of construction ought not to be applied*, and I can not find any trace of its ever having been applied. It is of the highest importance to the administration of criminal justice that acts creating crimes should be certain in their terms and plain in their application, and it would be in no small degree unseemly that Courts should be called upon in administering the criminal law to adjudge an act creating offenses at one time valid and at another time void. It must, I think, stand as it has been enacted or not stand at all." See also opinion, Seldon, J., page 441.

V.

ASIDE FROM THE STATUTE UNDER CONSIDERATION THE DEFENDANT IN ERROR HAD NO RIGHT TO REMOVE AND DESTROY THE NETS AS BEING A PURPRESTURE OR NUISANCE.

1. The nets were not an obstruction to navigation, and in no manner affected the rights of the public. They were not a permanent erection or inclosure upon the public lands, but were simply placed in the public waters for a temporary purpose in the exercise of the common law right to fish, which is common to all citizens.

Trustees of Brookhaven vs. Strong, 60 N. Y., 56.

They were not even a purprestnre, as the existence of such involves the commission of a trespass upon the public lands or waters of a permanent erection or inclosure.

Wood on Nuisances (2d Ed.), §§ 77, 84, 580.
People vs. Horton, 64 N. Y., 610, 615.

Much less were they a nuisance; as to be such there must be some interference with the rights of the public.

Wood on Nuisances (2d Ed.), §§ 87, 480.
Griffiths vs. McCullum, 46 Barb., 561.

2. But were they a purpesture or even a nuisance the result would be the same. A purpresture can only be removed by a suit in the name of the people. It is not even indictable.

Wood on Nuisances, 2d Ed., §§ 78, 84.

A public nuisance can only be abated by an individual when he suffers special and pecu-

liar damages not common to the public at large.

Wood on Nuisances (2d Ed.), §§ 732, 733, 740.
Fort Plain Bridge Co. vs. Smith, 30 N. Y., 44.
Harrower vs. Ritson, 37 Barb., 301.
Rogers vs. Rogers, 14 Wend., 131.
Lansing vs. Smith, 8 Cowen, 146, 151.
Griffiths vs. McCullum, 46 Barb., 561.
Goldsmith vs. Jones, 43 How., Pr., 415.
Grant vs. Moak, 26 Hun, 380.

Mayor of Colchester vs. Brooks, 7 Queen's Bench, (53 E. C. L.) 339.
Dimes vs. Petley, 15 Queen's Bench, (69 E. C. L.) 276.
Brown vs. Perkins, 12 Gray, 89.

And he has no right of abatement if with reasonable care he can avoid the nuisance.

Mayor of Colchester vs. Brooks, 7 Queen's Bench, (53 E. C. L.) 339.
Dimes vs. Petley, 15 Queen's Bench, (69 E C. L.) 276.
Cobb vs. Bennett, 75 Penn. St., 326.

A public nuisance when it causes no special damages to an individual can only be abated by indictment or proceedings in equity at the suit of the people by their proper officers.

Wood on Nuisances, (2d Ed.) § 732, 4 Bl. Com., 167.
Lansing vs. Smith, 8 Cowen, 146, 151.
Francis vs Schwellkapf, 53 N. Y., 152, 155.
Doolittle vs. Supervisors, 18 N. Y., 160.
Griffith vs. McCullum, 46 Barb., 561.

3. In any event the destruction of the nets was unlawful. In the abatement of a public nuisance a private person has no right of interferance further than is necessary to protect his rights.

Wood on Nuisances, (2d Ed.) §§ 733, 741.
Moody vs. Supervisors, 46 Barb., 660, 666.
Taggart vs. Com., 21 Penn. St , 527.
Greensdale vs. Holliday, 6 Bing., 379.

And when the nuisance consists in the wrongful use of property and not in the property itself, its destruction is not authorized. If fishing nets do not obstruct the navigation of a vessel, the owner thereof cannot destroy or remove them, and if he does he is liable for the same.

Wood on Nuisances, (2d Ed.) 812, § 740.
Cobb vs. Bennett, 75 Penn. St., 326.

4. And so as to the claim of defendant in error that the nets were a nuisance because set in the water all winter. There is no evidence whatever to support any such contention, and besides the property was not destroyed because it had been so used during the winter months. The destruction did not take place until May, and any nets that had been used during the winter had a long time before been taken from the water and piled upon the shore where they were when drawn away to be destroyed.

Therefore, in any view in which the case can be considered, the defendant in error had no lawful right to destroy the property and is consequently liable for its value.

VI.

Upon the facts of this case the plaintiffs were entitled to recover the value of the property destroyed.

The suggestion that the plaintiffs in error are in *pari delicto* and therefore cannot recover, has no merit.

This rule only maintains where a party seeks to recover through some illegal act of his own, in which case the law leaves him where he is found. It has no application where the illegal act is entirely distinct and separate from the right of recovery.

1 Hilliard on Torts, (3d Ed.) 154, 155, 159, 164, 165, (Chap. 4, §§ 20, 21, 26.)
Welch vs. Wesson, 6 Gray, 505.

A recovery may be had where the right of recovery has no legitimate connection with and is not dependent on the illegality. Thus, where property is used in violation of a statute, the owner may, nevertheless, maintain an action for its damage or destruction. By the illegal use of the property, the owner does not forfeit or become divested of his rights in the same.

Nodine vs. Doherty, 46 Barb., 59, 60.
Berthoff vs. O'Reilly, 8 Hun, 16, 18.
Ely vs. Supervisors, 36 N. Y., 297, 300.
Harrower vs. Ritson, 37 Barb., 301, 310.

As is said by Taylor, J., in Larson vs. Furlong, 50 Wis., 690, "The property of a man does not become outlawed because he may have placed it where it becomes a public or private nuisance."

The right of recovery in this case was entirely distinct from the uses to which the property had

been put and the plaintiff's cause of action in no sense depended on such use.

As a result of the foregoing considerations, we submit that the trial Court correctly held the statute in question invalid and no defense to plaintiffs' cause of action, and the General Term and Court of Appeals erred in arriving at a contrary conclusion.

VII.

CHAPTER 141, LAWS OF 1886, SO FAR AS IT PROHIBITS FISHING IN THE WATERS OF LAKE ONTARIO, IS UNCONSTITUTIONAL.

This statute forbids the catching of fish with nets within one mile from the shore from the westerly point of Pillar Point to the Oswego County line. It is the only restraint upon fishing in these waters.

The above statute is void as unjustly restraining the liberty of the citizen.

1. The term liberty, as used in the constitution, does not mean absolute personal freedom alone, but it includes the right to follow such lawful industrial pursuits as the citizen sees fit, not injurious to the community.

Powell vs. Pennington, 127 U. S., 678, per Field, J., at pages 691, 692.

Butchers Union Co. vs. Crescent City Co., 111 U. S., 746.

People vs. Marx, 99 N. Y., 377, 386.
People vs. Gillson, 109 N. Y., 389, 399.
Matter of Jacobs, 98 N. Y., 98, 106.

2. Fishing was a lawful avocation at common law. It was regarded as a natural and inherent privilege open and common to all citizens.

Angell on Tide Waters, 21, 80, 107, 124.
Sloan vs. Biemiller, 34, Ohio St., 513, 514.

And this rule is applicable to fishing in the Great Lakes.

Sloan vs Biemiller, *supra*.

The Crown formerly exercised the right to grant free or exclusive rights of fishing to persons not the owners of the soil, but this was one of the grievances which led to the revolt of the Barons and the granting of *Magna Charta*, by the 16th chapter of which the Crown renounced all such right. Since that time neither the Crown nor Parliament has assumed to grant such right except in connection with the ownership of the soil, and then only to the owners of the uplands.

2 Black, Com., 39, 40, 417.
Magna Charta, Chap. 16.
Trustees of Brookhaven vs. Strong, 60 N. Y., 56, 64-67.
Osgood Case, 6 City H. Rec., 46.

This right of fishing in the arms of the sea and navigable rivers and lakes, is now presumptively free.

3 Kent's Com., 418.
Gould vs. James, 6 Cowen, 369, 376.
Trustees of Brookhaven vs. Strong, 60 N. Y., 56, 67.

And in the absence of an exclusive grant or

prescriptive right, the public have a common right of fishing in such waters of which they cannot be restrained.

De Jure Maris, by Lord Hale, Part 1, Chap. 4.
See 6 Cowen, 536, note.
Gould vs. James, 6 Cowen, 369, 376.

3. As fishing is a lawful avocation, it can not be regulated or restrained by the legislature, except in the exercise of the police power, or in other words, for the public good. This police power, as we have seen, must have reference to the comfort, safety and welfare of society.

Railroad vs. Huson, 95 U. S., 465. Per Strong, J., page 470 and 471.
Patterson vs. Kentucky, 97 U. S., 501. Per Harlan, J., page 504.
Cooley's Const. Lim., 577.
People vs. Gillson, 109 N. Y., 389, 401.
Matter of Jacobs, 98 N. Y., 98, 108.

And it is exercised as a matter of necessity which ceases when the necessity passes away.

Matter of Cheesebrough, 78 N. Y., 237, 238.

The rights of property and the natural rights of the individual, can not be invaded under the guise of police regulations, when that manifestly is not the purpose of the enactment. Courts are not bound by the legislative declaration of intent, but will look into the statute and see if it was in fact passed as a police regulation, that it is convenient and appropriate for that purpose, and that there is a fair, just and reasonable connection between it and the ends above mentioned. If not, it will be condemned.

Chy Lung. vs. Freeman, 92 U. S., 268, 275.
Yick Wo vs. Hopkins, 118 U. S., 356, 366.
Matter of Jacobs, 98 N. Y., 98, 110.
People vs. Gillson, 109 N. Y., 389, 401.

The act in question was not a proper exercise of the police power within the above cases.

1. It is not a reasonable regulation of time and manner of catching fish having in view the preservation of the food supply but it is a perpetual prohibition of fishing in any other way than by angling at all seasons of the year. Thus it makes fishing in a certain manner forever legal and in another manner forever illegal. This is not regulation, but the prohibition of an important branch of industry.

Wyncheimer vs. People, 13 N. Y., 378.
Comstock, J., pages 398–401.
Roosevelt vs. Godard, 52 Barb., 534.
Rogers vs. Jones, 1 Wend., 359, 360.

2. It unjustly discriminates between two rival branches of industry by permitting one and prohibiting the other. The effect of the act is to abridge the privileges of a portion of the citizens and to deprive them of rights and privileges secured to others and hence comes within the constitutional inhibition.

Const. U. S., 14th Amend., 81.

3. It selects a small territory containing only about twenty square miles, and makes illegal in those waters what is legal in every other part of Lake Ontario and its bays and inlets, and in every other county bordering on the lake.

4. The act deals entirely with international waters, and from the very nature of the case, regulations not based on reciprocity of arrangements between the two countries cannot be effective instruments for the public welfare.

For the above reasons it is manifest that the act was not passed as a public measure and for the public good, but in the interest of a certain class of persons who, for the purpose of protecting one branch of industry, seek to have a kindred branch absolutely prohibited. There is no fair, just and reasonable connection between the act and the conservation of the public comfort, safety and welfare, hence it cannot be upheld.

People vs. Gillson, 109 N. Y., 389, 400, 401.

The case in this respect is similar to the *Jacob's case*, where an act forbidding the manufacture of cigars in tenement houses in New York and Brooklyn was held unconstitutional. The act was passed ostensibly as a health measure, but was condemned by the Court because being confined to those two cities and to tenement houses having more than three families, it was evident it had no relation to the public health.

The analogy between that case and the one at bar is complete Because this act discriminates between rival branches of industry by permitting one and prohibiting the other, because it singles out a small territory in Jefferson county and forbids that which is lawful under certain other circumstances in those

waters, and is also lawful in every other county and in every other part of Lake Ontario, and because it deals with waters one-half at least of which is entirely beyond legislative control, it is evident that it was not designed to promote the public welfare.

5. The act is further violative of the constitutional provision which forbids the taking of private property without due process of law.

In depriving the citizen of the right to fish with nets, the legislature have practically confiscated that class of property. They have certainly so curtailed its use as to render it valueless. The rule is that any legislation which deprives property of any of its essential attributes deprives the owner of his property within the meaning of the constitution.

People vs. Otis, 90 N. Y., 48, 52.
Matter of Jacobs, 98 N. Y., 105, 106.

And as fishing does not cause any positive annoyance or danger to the rights of the public, the legislature cannot, in the exercise of the police power, deprive the owners of the property aforesaid without making due compensation for the same.

State vs. Franklin Falls Co., 6 Amer. Rep., 510, 513 (49 N. H., 240).

6. The cases cited by defendant's counsel do not militate against this view.

Phelps vs. Racey, 60 N. Y., 10, involved the construction of a general statute applicable to the whole state which merely *regulated* and did not *prohibit* the killing and traffic in

game. It was plainly a proper exercise of the police power.

In Smith vs. State of Maryland, 59 U. S., 269, a statute had been passed forbidding the taking of oysters with a scoop or drag in any of the waters of Maryland. It was not only a general regulation which could well be said to have been intended for the public good, but as oysters are not migratory the case has no analogy to legislation that has reference to migratory fish alone. The same remarks are applicable to Smith vs. Levinus, 8 N. Y., 472. And in State vs. Roberts, 47 Amer. Rep., 199, Hooker vs. Cummings, 20 John., 101, and Rogers vs. Jones, 1 Wend., 260, it is merely held that the legislature has power to regulate the time and manner of taking fish, a proposition which is not disputed.

VIII.

THE LEGISLATURE HAD NO CONSTITUTIONAL POWER TO PASS AN ACT FORBIDDING THE CATCHING OF FISH IN THE WATERS OF LAKE ONTARIO.

1. It is provided by the U. S. Constitution that the judicial power shall extend to all cases of admiralty and martime jurisdiction.

U. S. Const., Art. 3, Sec. 2.

This jurisdiction extends to all things done

upon or relating to the sea, to all damages and injuries upon the sea, and to all maritime contracts, torts and injuries.

In re Josephine, 39 N. Y., 19, 22.
In re Belfast, 7 Wall., 654.

And by the judiciary act of 1789, the jurisdiction is made exclusive except in cases where the common law gave a remedy therefor.

The Moses Taylor, 4 Wall., 411, 431.
In re Josephine, 39 N. Y., 19, 21, 22.
Brookman vs. Hammill, 43 N. Y., 554, 557.
The Hine, 4 Wall., 555, 572.

It was the design of the Constitution and judiciary act to preserve to the State Courts such jurisdiction as they possessed and exercised when the Constitution was adopted.

The Hine, 4 Wall., 555, 572.
The Moses Taylor, 4 Wall., 411, 431.
Baird vs. Daly, 57 N. Y., 236, 247.

Under the above provisions of the Constitution and act of 1789, the United States Courts have exclusive jurisdiction upon the Great Lakes, the same as upon the high seas. The jurisdiction extends to all public navigable lakes and rivers where commerce is carried on between different states or with a foreign nation.

The Genesee Chief, 12 How., (U. S.) 443.
The Eagle, 8 Wall, 15.
The Hine, 4 Wall., 555.
Baird vs. Daly, 57 N. Y., 236, 246.

And as we understand this Court has very recently held that the Great Lakes were for

all purposes of admiralty and maratime jurisdiction, regarded as the high seas.

United States vs. Rodgers, decided Nov. 20, 1893.

And the act of 1845, which purported to extend the jurisdiction of the United States Courts and concurrently of State Courts is in that respect is inoperative.

The Eagle, 8 Wall., 15.

2. A person who unlawfully fishes in the waters of Lake Ontario commits a maritime tort, as it is a matter done upon and relating to the sea. Exclusive jurisdiction of the same is vested in the United States Courts, as fishing being lawful at common law there was no common law remedy and hence the case is not brought within the saving clause of the act of 1789.

3. The waters of Lake Ontario being international and regarded under the above authorities as part of the high seas, and the State Courts possessing no jurisdiction over the same, it follows that the legislature has no jurisdiction to legislate, with regard to acts performed on such waters. It would be a most anomalous rule that would confer jurisdiction to so legislate, and at the same time prohibit our state Courts from enforcing such legislation.

The rule is elementory that the statues of a state have no force beyond its territorial limits.

Hoyt vs. Thompson, 5 N. Y., 320, 340.

For the reasons above mentioned the act (Chap.

144, Laws of New York of 1886) has no binding force over the waters of Lake Ontario, andso far as those waters are concerned is unconstitutional and void.

The defendant in error, acting under the authority of the statutes which are assailed (Chap. 591, Laws of N. Y. 1880, as amended by Chap. 317, Laws of N. Y., 1883, and Chap. 141, Laws of N. Y., 1886) seized and destroyed the property in question. The only license claimed for his acts arises from the statutes aforesaid, and if either statute fails his defense likewise fails.

It is submitted that the statutes above cited are repugnant to the provisions of the constitution of the United States and are void.

See amendment, U. S. Const., Art. 5 and Art. 14, § 1..
Also Art. 3 of Const., § 2.

And that being unconstitutional and void they furnished no protection for the acts done under the same.

Norton vs. Shelby Co., 118 U. S., 426
Virginia Coupon Cases, 114 U. S., 272.

As the statutes aforesaid aud the authority exercised by the defendant in error under the same must fail, it follows that the judgment of the Trial Court was right and the General Term of the Supreme Court and the Court of Appeals erred in reversing the same.

The decision of the Court of Appeals of New York and the judgment entered upon the same has therefore denied to the plaintiffs in error certain rights, privileges and immunities secured to

them by the constitution of the United States, and it should be reversed, and that of the Trial Court affirmed, and to that end the case should be remanded to the State Courts for further proceedings in accordance with such decision.

Lewis A. Brown

S. C. EMERSON,

Counsel for Plaintiffs in Error,

Watertown, N. Y.

Office Supreme Court U. S.
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CLERK.

Supreme Court of the United States.

GEORGE W. LAWTON and FRANK C. MULLIN,
Plaintiffs in Error.
vs.
WILLIAM N. STEELE.

No. 14, 184.

POINTS AND ARGUMENT FOR THE DEFENDANT IN ERROR.

This case is brought before the Supreme Court upon a writ of error (pp. 1, 2,) from a judgment (p. 34) entered in the Supreme Court of New York pursuant to a decision rendered by the Court of Appeals on the opinion of Judge Andrews, (pp. 34-41.) The case was originally tried at a Circuit of the Supreme Court in Jefferson County before Mr. Justice Williams of the Supreme Court, upon whose decision (pp. 19-30) judgment was entered in favor of the plaintiff for $216 damages, and $166.09 costs. The defendant in error took an appeal from this judgment to the General Term of the Supreme Court of New York, (f. 19) and that Court reversed the judgment entered on the decision of Mr Justice Williams (f. 57) and ordered a new trial. From the judgment entered upon this decision, the plaintiffs in error appealed to the Court of Appeals, (p. 6) and stipulated that if the order reversing the judgment and granting a new trial should be affirmed, judgment absolute should be rendered against the appellant. The Court of Appeals having affirmed the judgment of the General Term, its decision was made an order of the Supreme Court, (f. 58) and

final judgment was entered dismissing the complaint and allowing the defendant Steele to recover of the plaintiff $377.36, costs of the action.

The action was brought to recover the value of sixteen hoop or fyke nets which the defendant had destroyed, twelve of which were set in the waters of Black River Bay, an inlet of Lake Ontario at the mouth of Black River, in said County, for the purpose of catching fish. It was stipulated by counsel (f. 37) that twelve of these nets were worth fifteen dollars apiece, and that four of the nets which were not set in the water, but were on shore, were worth thirty six dollars. Judgment was entered for the full amount, $216. The highest value set upon any of the nets was fifteen dollars and the lowest nine dollars.

The defendant in error to justify the seizure and destruction of this property, proved that he was a State Fish and Game Protector appointed by the Governor of the State under Chapter 591, Laws of 1880, (f. 31). He then contended that he was authorized to make the seizure as such public officer under the authority of the following statutes of the State:

"Chapter 141, Laws 1886. Section 1. No person shall at any time kill or take from the waters of Henderson Bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar Point and the boundary line between the counties of Jefferson and Oswego, * * * * any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand. But this section shall not apply to or prohibit the catching of minnows for bait, provided

the person using nets for that purpose shall not set them and shall throw back any trout, bass or any other game fish taken, and keep only chubs, dace, suckers or shiners."

"Section 2. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and liable to a penalty of fifty dollars for each offense."

Section 3. (Unimportant.)

Chapter 591, Laws of 1880, as amended by Chapter 317, Laws 1883, is as follows:

"Section 2 Any net, pound or other means or device for taking or capturing fish or whereby they may be taken or captured, set, put, floated, had, found or maintained, in or upon any of the waters of this State, or upon the shores of or islands in any of the waters of this State, in violation of any existing or hereafter enacted statutes or laws, for the protection of fish, is hereby declared to be and is a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same * * * and no action for damages shall lie or be maintained against any person for or on account of any such seizure or destruction."

Justice Williams ruled that the provisions of law in the last statute cited, although embracing the case at bar in express terms, were void, because they deprived the plaintiff of his fish nets in violation of the constitutional provision, that no person shall be deprived of property "without due process of law." On all other questions the opinion of

Justice Williams was in favor of the defendant in error. The judgment of the General Term reduced the judgment of the trial court from $216 to $36, the value of the four nets which were on shore as to which the defendant did not justify his seizure.

The plaintiffs in error sacrificed the benefits to which they would have been entitled under this reduced judgment by their appeal to the Court of Appeals, with the accompanying stipulation that if judgment was rendered against them, it should be judgment absolute for the dismissal of the complaint.

POINTS.

I.

The plaintiffs in error have taken out the writ in this case (f. 4) on the ground that the authority exercised by the defendant under and in pursuance of aforesaid statutes "were violative of and repugnant to the provisions of the constitution of the United States and particularly to the provisions of Article fifth of the amendments, and Section one, Article fourteen of the amendments to said constitution." But it is clear that the fifth amendment applies exclusively in restriction of federal power, and has no application to the states. Thorington v. Montgomery, 147 U. S., 490. If obnoxious to any provision of the constitution, it must be the fourteenth amendment. Without entering upon an exhaustive discussion of the meaning and history of the clause "due process of law," it may be stated that the clause has a well defined meaning when used in relation to cases like the one at bar in restraint of the police power of the states. "Due process of law in each particular case means such

an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley's Constitutional limitations, 6th Edition, 434. Many authorities are cited to this proposition bearing closely upon this appeal in the note on the same page. In State v. Allen, 2 McCord 56, the Court in speaking of process for collection of taxes, say: "We think that any legal process which was originally founded in necessity, has been consecrated by time and approved and acquiesced in universal consent, must be considered an exception to the right of trial by jury and is embraced in the alternative 'law of the land.'" The fourteenth amendment has not enlarged the meaning of the words "due process of law." Whatever was such in the State before that amendment is so still. The fourteenth amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. Minnesota R. R. Co. v. Beckwith, 129 U. S, 26, it was not designed to interfere with the exercise of the police power of the State. Powell v. Pennsylvania, 127 U. S., 678. Neither does the fourteenth amendment profess to secure to all persons in the United States the benefit of the same laws and same remedies. Great diversities may and do exist in these respects in different States. One may have the common law and trial by jury; another the civil law and trial by the Court. All that one can demand under the last clause of section one of the fourteenth amendment is that he shall not be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and

under like circumstances. Missouri v. Lewis, 101 U. S., 22. Hayes v. Missouri, 120 U. S., 68.

Police regulations by the state which affect alike all persons similarly situated, are valid. (Barbier v. Connolly, 113 U. S., 27.) Every law comes within the description of the police regulation which concerns the welfare of the whole people of the state or any individual within it, and its operation is confined within the territorial limits of the state and on persons or things therein. (Henderson v. Mayor, 92 U. S., 259.)

If we examine the statutes of the state of New York here brought in question and the acts of the defendant in error, done in pursuance of their authority, it will appear that both the statutes and the acts done under them, are well within the police power of the state of New York, as defined by the foregoing cases, and as asserted and exercised from time immemorial within that state and other states having a similar jurisprudence. The state possesses ample authority to rid the fisheries of such devices as are destructive of them, without negotiation with or judicial proceedings against the offending owners who have constructed or placed such devices in the fisheries in violation of the law protecting the same.

Phelps v. Racy, 60 N. Y., 10. Approved 13 Vr., (N. J.,) 345 and 97 Ill., 332, 337.

State v. Snover, 43 N. J., 341, (1881.)

Williams v. Blackwell, 2 Hurlstone and Coltman, (Exchequer.) 33.

Smith v. Levinus, 8 N. Y., 472.

State v. Lewis, (Indiana, 1893,) 33 N. E. R., 1024.

In Phelps v. Racy, 60 N. Y., 10, Chief Judge

Church, writing as to the constitutionality of a statute against having in possession certain game birds out of shooting season, and after stating that "with the policy of the statute in question we have no concern," says:

"The objection of a want of power in the legislature to pass the act is not tenable. It is not in conflict with the state constitution within the case of Wynehamer vs. People. (13 N. Y., 378.) That case involved the validity of the prohibitory liquor law, and determined that such law, so far as it applied to and substantially destroyed property in liquors owned or possessed at the time the act took effect, was in violation of that provision of the state constitution which declares that no person shall be deprived of life, liberty or property, without due process of law, but impliedly, if not necessarily, it affirmed the power if the law had only applied to liquors subsequently manufactured and acquired. Here the property was acquired subsequent to the passage of the act, and with the presumed knowledge of its provisions and conditions. The legislature may pass many laws, the effect of which may be to impair or even destroy the right of property. Private interest must yield to the public advantage. All legislative power not restrained by express or implied provisions of the constitution, may be exercised. The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect unjustly or oppressively, the proper remedy must be applied by that body. Some of the provisions of the act in ques-

tion might seem to one unversed in the mysteries of the subject to be unnecessarily stringent and severe, but we cannot say that those involved in this action are foreign to the objects sought to be attained, or outside of the wide discretion vested in the legislature."

In State v. Snover, 43 N. J. L., 341, it was held that the State has a right to enter lands bordering a non-navigable stream to remove a fish basket constructed in violation of the statute, and to destroy the materials of which it was constructed.

In Williams v. Blackwell, 2 H. & C., 33, (Ex.), an Act of Paliament, which will be found on page 27 of the same volume, (2 H. & C.) authorized the summary destruction of what is known as a salmon engine, being fish nets, set in violation of its provisions. Seizure and destruction under the act were justified. Such nets were deemed a nuisance.

In Smith v. Levinus, 8 N. Y., 472, the Court say: "One of the purposes for which the people own the beds of such waters is to protect and regulate the rights of fishing in them. The legislature may make such laws for this purpose as it deems most beneficial to the common enjoyment of the right, in the same manner that it may for the public convenience authorize wharves to be erected upon navigable waters."

In State v. Lewis, 33 Northeastern Reporter, 1024, the Supreme Court of Indiana as recently as April, 1893, considers and approves of the doctrines laid down in the foregoing cases in arriving at the conclusion that the statute of that state making it a misdemeanor for any one to have in his possession

a net or seine, is a constitutional exercise of police power.

See also:

Holyoke Water Power Co. v. Lyman, 82 U. S. 15 Wall, 500.

Commissioners v. Chapin, 5 Pickering, 199.

Commissioners v. Essex Co., 13 Gray, 247.

Inland Fishing Comrs. v. Holyoke Water Power Co., 104 Mass., 446.

The exercise of power by the State so fully justified by the foregoing authorities for the protection and regulation of fisheries may be sustained as a police power.

1st In the language of Judge Andrews: "The right of summary abatement of nuisances without judicial process or proceeding was an established principal of the common law long before the adoption of our constitution, and it has never been supposed that this common law principle was abrogated by the provision for the protection of life, liberty and property in our State constitution, although the exercise of the right might result in the destruction of property." This question was referred to by Sutherland, J., in Hart v. The Mayor, &c., 19 Wend, 590. He said: "If this is a case in which the corporation or any other person had a right summarily to remove or abate this obstruction, then the objection that the appellants by this course of proceeding may be deprived of their property without due process of law or trial by jury has no application. Formal legal proceedings and trial by jury are not appropriate to and have never been used in such cases." See also

opinion of Edmonds, Senator, in S. C., pg 609. In the license-tax cases (5 How. U. S., 504) Judge McLean, speaking of this subject, said: "The acknowledged police power of a State often extends to the destruction of property A nuisance may be abated. Everything prejudicial to the health and morals of a city may be removed." In Rockwell v. Nearing, (35 N. Y., 308) Porter, J., speaking of the constitutional provision, said: "There were many examples of summary proceedings which were recognized as due process of law at the date of the constitution, and to them the prohibition has not application." Quarantine and health laws have been enacted from time to time from the organization of our State government authorizing the summary destruction of infected cargo, clothing or other articles, by officers designated, and no doubt has been suggested of their constitutionality. In Hart v. The Mayor (*supra*) a question was raised as to the validity of a city ordinance subjecting a float moored in the Albany basin to summary seizure and sale upon failure of the owner to remove the same after notice. The Court held the ordinance to be void, as not within the power conferred upon the city by its charter, but it was held that the common law right of abatement existed, although the removal of the float in question involved its destruction. VanWormer v. The Mayor (15 Wend., 263) sustained the right of the corporation to dig down a lot in the city to abate a nuisance, although in the process of abatement buildings thereon were pulled down. In Meeker v. VanRensselaer (15 Wend., 397) the Court justified the act of the defendant, as an individual citizen, in tearing down a filthy tenement house, which was a nuisance, to prevent the spread of the Asiatic cholera.

These authorities sufficiently establish the proposition that the constitutional guaranty do s not take away the common-law right of abatement of nui. sances by summary proceedings without judicial trial or process. * * * * The owner of the nets is deprived of his property, but not as the direct object of the law, but as incident to the abatement of the nuisance. Where a private person is authorized to abate a public nuisance, as in case of a house built in a highway or a gate across it which obstructs and prevents his passage thereon, it was long ago held that he was not required to observe particular care in abating the nuisance, and that although the gate might have been opened without cutting it down, yet the cutting down would be lawful—Lodie v. Arnold, 2 Salk., 458, and cases cited —but the general rule undoubtedly is that the abatement must be limited by necessity and no wanton and unnecessary injury must be committed. 3 Bl. pg. 6 note. It is conceivable that nets illegally set could with the use of care be removed without destroying them; but in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the legislature could adjudge their destruction as a reasonable means of abating the nuisance."

In American Rapid Telegraph Company v. Hess, 125 N. Y., 641, the plaintiff sought to recover against the defendant for forcibly removing telegraph poles and wires in the streets of the city of New York maintained by the Company, after notice to remove the same to the subways on the ground that they could not be removed except by judicial process. Held untenable, as the legislature had the power to declare their continuance in the

streets a nuisance. The same doctrine was sustained in the Electric Improvement Company v. San Francisco, 45 Federal Reporter, 593, 596.

In Hickey v. Michigan Central R R. Co., a case so recently decided as not yet to be reported in the regular Michigan reports, and found in 55 Northwestern Reporter, 989, the Supreme Court of Michigan decided that where branches of a tree overhang the right of way, constituting a nuisance, the railroad company may remove the projecting parts without giving notice when the owner knows that the Company claims they are a nuisance and desires their removal which he refuses.

In Newark & S. O. Co. v. Hunt, 50 N. J. L., 308, it was held that a health officer may be empowered to kill a diseased beast if the owner may afterwards contest the existence of conditions which made the beast a nuisance and retain redress if such conditions are not shown to have existed. The plaintiffs in error could in this case recover for the nets which had been removed, if they could show that they were not set in violation of the law, and their right to recover for the four nets which were not set was recognized by the Court, and not contested by the defendant in error.

In Blazier v. Miller, 10 Hun., 435, the Supreme Court of New York held that the Board of Health of the city of Syracuse could through an inspector seize and examine all milk offered for sale in that city upon having reasonable cause to believe that the same was below the standard quality of pure wholesome milk, and destroy the same if proved to be below such standard without notice to the owner.

Judge Cooley in his work on Constitutional Limi-

tations, (p. 740,) says: "So a particular use of property may sometimes be forbidden where, by a change of circumstances, and without the fault of the owner, that which was once lawful, proper, and unobjectionable has now become a public nuisance, endangering the public health or the public safety. Mill dams are sometimes destroyed upon this ground; and churchyards which prove, in the advance of urban population, to be detrimental to the public health, or in danger of becoming so, are liable to be closed against further use for cemetery purposes. The keeping of gunpowder in unsafe quantities in cities or villages; the sale of poisonous drugs, unless labelled; allowing unmuzzled dogs to be at large when danger of hydrophobia is apprehended; or the keeping for sale unwholesome provisions, or other deleterious substances, are all subject to be forbidden under this power. And generally it may be said that each state has complete authority to provide for the abatement of nuisances, whether they exist by the fault of individuals or not, and even though in their origin they may have been permitted or licensed by law."

See also notes at the bottom of the page, 740, 741.

The removal of obstacles of navigation in navigable waters when consisting of personal property placed there intentionally or accidentally, could unquestionably be removed summarily without process. Fishing apparatus so placed as to impede navigation would have to yield, and could be removed as a nuisance. Stockton vs. Baltimore & N. R. R. Co. 32 Federal Reporter, 9.

Legislative discretion is often exercised for the abatement of a nuisance deliberately caused, and

property of trivial value like gambling kits used as the means to create it, is destroyed summarily. See New York Penal Code, sections 338, 345, 346.

A powder house in a public place could not be destroyed, but could be removed, if a nuisance. A torpedo set in the highway could be both removed and destroyed. In the case of the powder house, the nuisance would consist of valuable property wrongly placed, which should not be destroyed in the removal. In the case of the torpedo, the nuisance would consist of an unlawful or malicious device, to the destruction of which the law might be constitutionally directed, and the small elements of property in a torpedo could not intervene to restrict the police power of the State. A wild steer in Broadway could be shot down as a nuisance as well as a menance to public safety. The fish nets in this case do not appear in any instance to have exceeded in value fifteen dollars. Their removal from the waters of Lake Ontario must necessarily have involved to a great extent their destruction. See also :

Griffith v. McCullum, 46 Barb., 561.
Harrower v. Ritson, 37 Barb., 301.
Hart v. Mayor of Albany, 3 Page, 216.
People v. Cipperly, 37 Hun, 319.
Same case, 101 N. Y., 634.
Hinckley v. Emerson, 4 Cowen, 351.

The right of the legislature in the exercise of a of a reasonable discretion to declare that a nuisance which was not before a nuisance cannot be questioned

Mugler v. Kansas, 123 U. S., 623.
Coe v. Shults, 47 Barb., 65.

See Matter of Jacobs, 98 N. Y., 98, 108–9.
Reg. v. Crashow, Bell C. C., 303 S. C., L. J. M. C., 58.
McLaughlin v. State, 45 Ind., 358.
Munroe v. Gerspach, 33 La An., 1011.
State v. Fowler, 13 R. I., 661.
Davis v. Sawyer, 133 Mass., 289.
See Sawyer v. Davis, 136 Mass., 239.
Leigh v. Westervelt, 2 Duer, 618.
Harris v. Thompson, 9 Barb., 350.

Commissioners of the highways may abate a public nuisance in the highway without reference to the special injury to the private owner and commit no trespass.

Kellogg v. Thompson, 66 N. Y., 88.

The means of the abatement of a nuisance must be within the reasonable discretion of the law making power. The authorities limit the private right to abatement of public nuisances to such as suffer special injury from the nuisance and then only to the extent that it may be necessary to relieve the suffering party. A traveler on the highway may not remove a fence set in the highway unless it impedes his *travel*, and then only to the extent necessary to enable him to continue his journey. But the defendant in error was a public officer and his action was under a public statute for the public benefit.

Judge Andrews carefully describes and defines a nuisance in his opinion Wood on Nuisances on page one, defines it as follows: "A nuisance in the ordinary sense in which the word is used, is anything that produces an annoyance, anything that disturbs one or is offensive; but in legal phraseology

it is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct working an obstruction of or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage."

2nd. The power of the state of New York to regulate the fisheries of Lake Ontario may be also sustained on the ground that such fisheries are held in trust by the state for the benefit of all her people, and the right and duty to regulate and control them springs from the obligations of this trust

Martin v. Waddell, 41 U. S., 16 Pet. 367.
Russell v. Jersey Company, 56 U. S., 15 How., 426.
McReady v Virginia, 94 U. S., 391.

It would be an unreasonable restriction upon the legislative authority, charged as it is with the care of these vast food supplies and fields of recreation, to interpose the constitutional limitation against the taking of property without due process of law, as a shield to every trespasser upon this public and common interest. The nets are impediments which should be removed by the authorities in active charge of the trust, and as appears in this case, they are of less value than the probable expense of maintaining officers to destroy them. Constitutional provisions were never intended to protect thieves or freebooters in the commission of crime by treating the petty implements of their trade, though innocent in themselves and capable of some honest use as valuable property.

"One unversed in the mysteries of the subject," as Chief Judge Church says in Phelps vs. Racy, cannot easily understand or appreciate the necessity for summary action against such violators of the law as would set twelve or thirteen of these large nets in a bay a mile wide all winter for two or three hauls, as the printed case shows, to the utter destruction of all fish; nor the difficulty of finding the nets set, or apprehending the offender. The wide territory open to violators of the fish laws, the ease with which they ply their trade at night without a signal on the water, and the impossibility of finding the owner of the net, are some of the embarrassments in protecting fish.

No question can arise here as to that part of the statute which the Court of Appeals adjudged to be unconstitutional as the determination of the Court was in favor of the application of the constitutional provision as to due process of law to that extent. The defendant in error did not justify in the trial court as to the nets on shore, and as that portion of the law has been adjudged unconstitutional by the state court, there is no occasion for its further consideration. The right of the State Court to separate and sustain the constitutional provisions of this law while rejecting the unconstitutional provisions, is too well established by authority to need argument.

II.

The right and duty to regulate, control and pro-

tect the fisheries in navigable waters along the shores of the Ocean and Great Lakes, has always been within the province of the States owning the adjacent territory.

Smith v. Maryland. 18 How., U. S., 71.
Smith v. Levinus, 8 N. Y., 472.
State v. Thompson, 85 Me., 189.

The conveyance by the State of the shores of Lake Ontario and even of the land under Black River Bay did not convey the fisheries in said bay, there being no express words specifying fisheries.

Bank v. Richtmeyer, 14 John., 255.
Hooker v. Cummings, 20 John., 101. End of opinion. Approved 1 Wend., 260.
Osgood's Case, 6 City H. Rec., 4.

One owning all around a lake may not take fish contrary to statute if the lake connects with public waters.

State v. Roberts, 59 N. H., 256.
Same Case, 47 Am. Rep., 199.

Sandusky Bay in Lake Erie is not owned by riparian owners.

34 Ohio St., 492.

Although the other questions raised by the plaintiffs in error on the appeals in the state courts are not in issue before this court, they may be briefly referred to for a better understanding of the case. The positions taken by the plaintiffs in error, which were overruled by the courts below, apart from the constitutional question, are treated at length in the opinion of Mr. Justice Williams with ample citation of authorities, and are briefly as follows:

1. The enactment of laws for the protection of fish in certain localities is constitutional.

Phelps v. Racy, 60 N. Y., 10.
State v. Roberts, 59 N. H.. 256 S. C., 47 Am. R., 199.

2. These nets were set with the intention of taking fish, (ff. 46-48). This taking was in violation of Ch. 141, Laws 1886, and was a crime. The attempt to commit a crime is a crime.

Penal Code, Secs. 34, 686.

The nets were therefore set in violation of law within the letter and meaning of Sec. 2, Ch. 317, Laws 1883.

3. Black River Bay was included in the provisions of Ch. 141, Laws 1886.

(*a*) The special mention of Henderson Bay does not by implication exclude other bays, since Henderson Bay is more than a mile wide, and fishing with nets would not have been prohibited in some parts of its waters by the mile limit. The whole of Henderson Bay was intended to be freed from nets and the statute extended to all other waters one mile from shore.

(*b*) A bay is a part of the sea or lake, defined as an "arm of the sea." Being a part of the lake, it is covered by the words "Lake Ontario," unless expressly excepted.

(*c*) The prohibition is from fishing not one mile from shore, but one mile from "the shore between the most westerly point of Pillar Point and the boundary line between

the counties of Jefferson and Oswego." The intent was to follow the shore as a base.

(*d*) If Black River Bay is excepted, all other bays, as Sherwin's Bay, Mill's Bay, and all other bays and inlets must be excepted. This would destroy the certainty of the law. Arms of the lake are not delminated from the main body of water by well settled lines of demarkation.

(*e*) No part of Lake Ontario north of Six Town Point, except Henderson Bay, is within the statute if bays are not included. The waters other than Henderson Bay, lying between Pillar Point and Six Town Point, are Sherwin's Bay and Black River Bay. The legislature did not make a mistake in naming Pillar Point instead of Six Town Point.

The judgment of the Court below should be affirmed.

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